

No. 16351

United States
Court of Appeals
For the Ninth Circuit

KIM BROS., a Partnership,

Appellant,

vs.

L. A. HAGLER,

Appellee.

Transcript of Record
In Two Volumes

Volume I
(Pages 1 to 258)

Appeal from the United States District Court for the
Southern District of California
Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, for the
Southern District of California, Northern Division
No. 1793—ND

KIM BROS., a Partnership,

Plaintiff,

vs.

L. A. HAGLER and MRS. L. A. HAGLER, JOHN
DOE I, JOHN DOE II, JOHN DOE III and
SALLY SOE I, SALLY SOE II and SALLY
SOE III,

Defendants.

COMPLAINT FOR INFRINGEMENT OF PAT-
ENT, DAMAGES AND FOR AN ACCOUNT-
ING

Plaintiff complains of defendants and for cause
of action alleges:

I.

That plaintiff is a partnership duly constituted
under the laws of the State of California, consist-
ing of Chas. Ho Kim, Hyeng S. Kim and Daisy
Kim; that plaintiff has complied with Sections 2466
and 2468 of the Civil Code of California;

II.

That plaintiff does not know the true names of
the defendants sued herein as John Doe I, John
Doe II, John Doe III, Sally Soe I, Sally Soe II,
and Sally Soe III, and therefore sues said defend-
ants by such fictitious names, and pray that when

the true names of said defendants be ascertained they be permitted to amend this complaint by substituting the true names of said defendants for such fictitious names, together with proper charging allegations;

III.

That on August 22, 1950, the United States of America granted to [2*] Fredric W. Anderson that certain plant patent No. 974, a copy of which is attached hereto and made a part hereof and marked Exhibit "A"; that on the 1st day of September, 1950, the said Frederic W. Anderson assigned, in writing, said patent and all interest therein to Plaintiff herein; and plaintiff herein, is now, and was at all times herein mentioned the exclusive owner of said patent 974; that under the exclusive rights of said patent and covered by said patent the plaintiff herein produced for planting and commercial use, one of the nectarines covered by said patent, commonly called and known as the Sun Grand nectarine.

IV.

That said Sun Grand nectarine is a new variety, especially propagated and produced in co-operation with the said Frederic W. Anderson, assignor of said patent 974, and the plaintiff herein; that said nectarine has a beautiful yellow colored flesh, very palatable, early ripening, a prolific producer, a vigorous tree, and has received consumer approval in the market, and by reason of its excellence in color and texture, the said Sun Grand nectarine

*Page numbering appearing at foot of page of original Certified Transcript of Record.

brings a premium price above the average good quality nectarines, of from \$1.00 to \$2.00 per package, and is extremely valuable commercially; and the description in patent Exhibit "A" is incorporated herein.

V.

That defendants herein, L. A. Hagler and Mrs. L. A. Hagler, own a substantial ranch in Tulare County, and have owned said ranch at all times herein mentioned; and that defendants herein at all times mentioned herein had actual and personal knowledge of the fact that plaintiff herein was the owner of the said patent 974 above referred to, and that under said patent the Sun Grand nectarine, so-called, was covered by said patent; that notwithstanding knowing all these facts and knowing the plaintiff herein was the owner of said patent and of the said Sun Grand nectarine, defendants secretly, clandestinely and with deliberate intent to infringe and violate the patent rights of plaintiff herein, did during the year 1955 graft Sun Grand nectarine scions on other fruit trees on their said ranch in Tulare County, in the amount of 1,012 trees, and that defendants did in the year 1956, secretly and clandestinely bud over 759 trees of the same variety covered by plaintiff's patent, making a total number of trees [3] of the Sun Grand variety which defendants have now planted on their ranch in Tulare County, 1,771 trees, and that the reasonable market value of said trees is \$4.00 per tree, making a total of \$7.084.00 due and owing

from defendants to plaintiff by reason of the unlawful and secret grafting and budding of trees as above stated to Sun Grand nectarine trees;

VI.

Plaintiff further alleges that defendants have marketed fruit from said Sun Grand nectarine trees so unlawfully, clandestinely and secretly budded over and grafted without the knowledge or consent of plaintiff, and in direct infringement and violation of plaintiff's said patent, and have sold and are selling Sun Grand nectarines during the 1957 marketing season, the product of said trees, in the amount of \$35,000.00; and that during the year 1956, plaintiff is informed, and believes, and upon such information and belief, alleges that defendants sold substantial amounts of said Sun Grand nectarines from said budded over and grafted trees, all without the knowledge or consent of plaintiff herein, and in direct clandestine and secret infringement and violation of plaintiff's patent; that plaintiff herein does not know the exact amount received by defendants from the sale of the fruit of the said Sun Grand nectarine trees above described, and in this connection plaintiff demands an accounting of the sale of all of the Sun Grand nectarines sold by defendants from said trees by way of infringement and violation of plaintiff's said patent, and plaintiff alleges that it has suffered actual damages by reason of the violation of said patent in the sum of \$35,000.00 for the season's operation of 1957, in addition to the market value

of said trees as aforesaid; and plaintiff has suffered direct losses of \$4.00 per tree for the grafting and budding of other trees on defendants' ranch in the sum of \$7,084.00; and plaintiff prays that the aforesaid amounts, and each of them, be trebled; that the total amount of \$126,252.00 be awarded by this Court to plaintiff herein by way of damages for the secret and clandestine infringement and violation of plaintiff's said patent by defendants, as herein alleged, and in this connection in substantiation of treble damages as herein prayed for, plaintiff alleges that defendants knew at all times herein mentioned that plaintiff herein owned said plant patent No. 974 on nectarines [4] covering said Sun Grand nectarine; and that the said Sun Grand nectarine above described is covered by said patent;

VII.

That plaintiff believes and does verily fear that defendants will, unless enjoined from so doing by this Court, continue to bud and/or graft other trees to Sun Grand nectarines, and produce, use, and sell said trees without plaintiff's consent; and plaintiff's pray that this Court issue a perpetual injunction enjoining defendants from using, budding, grafting, producing or selling any Sun Grand buds, graft scions, or trees, or selling Sun Grand nectarines, without the consent and license of plaintiff, and that plaintiff has no adequate remedy at law otherwise.

Wherefore, plaintiff prays judgment against defendants for the sum of \$7,084.00, being the actual

value of the Sun Grand nectarine trees at the regular price of \$4.00 per tree, and that said amount be trebled; that plaintiff have judgment also for \$35,000.00 for the value of the fruit of the Sun Grand nectarines sold during the year 1956-57 from the Sun Grand nectarine trees which defendants grafted over to other trees, as hereinabove alleged, and that said sum be trebled in the amount of \$105,000.00; that this Court order the said defendants herein to account for all Sun Grand nectarines, trees, grafts, buds, or otherwise which defendants have utilized in infringement and violation of this patent, and in the sale of Sun Grand nectarines which were not licensed to defendants, or either of them; and that plaintiff have judgment for the proper amount, with damages trebled as ascertained by said accounting; and that plaintiff have such other and further relief as is meet and equitable in the premises; that this Court grant a permanent injunction forever restraining defendants, their heirs, executors, administrators, or assigns, and agents from using, producing or marketing any Sun Grand nectarines, or bud, or scions, or trees, to the effective expiration of said patent, unless licensed so to do by plaintiff; together with costs of action herein.

SAVAGE & SHEPARD,

By /s/ H. A. SAVAGE,

Attorneys for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed July 23, 1957. [5]

[Title of District Court and Cause.]

ANSWER

Defendants L. A. Hagler and Gladys Hagler, sued herein as Mrs. L. A. Hagler, for answer to the complaint allege:

I.

Answering Paragraph I of the complaint on file herein, said answering defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph I and therefore deny the allegations of said Paragraph I.

II.

Answering Paragraph III of said complaint, said answering defendants allege that they are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in said Paragraph III and therefore deny that on August 22, 1950, or that on any other date, the United States of America granted to Frederick W. Anderson that certain plant Patent No. 974; [12] said answering defendants further deny on the grounds aforesaid that on September 1, 1950, or that on any other date, that the said Frederick W. Anderson assigned the alleged patent to the plaintiff; still further answering Paragraph III and on the same ground as aforesaid, said answering defendants deny all the remaining allegations of said Paragraph III.

III.

Answering Paragraph IV of the complaint said answering defendants deny each and every allegation of said paragraph; further answering said paragraph said answering defendants deny that the Sun Grand nectarine brings a premium price above the average good quality nectarine of from \$1.00 to \$2.00 per package, or any other amount.

IV.

Answering Paragraph V of the complaint, said answering defendants admit that they own a ranch in Tulare County and admit that they knew that plaintiff claimed to be the owner of a patent covering the Sun Grand nectarine; further answering Paragraph V of the complaint, said answering defendants deny that they secretly or clandestinely or with deliberate intent to infringe or violate the alleged patent rights of plaintiff, or in any other manner whatsoever, grafted in the year 1955, or in any other year, Sun Grand nectarine scions on other fruit trees on their own ranch, or elsewhere, in the amount of 1012 trees, or any other amount of trees; said answering defendants further answering said paragraph, deny that they in 1956, or in any other year, secretly or clandestinely or in any manner whatsoever budded 759 Sun Grand nectarine trees, or any other number of trees; said answering defendants still further answering Paragraph V, deny that there is due and owing from said defendants to plaintiff the sum of Seven Thousand Eighty-four and No/100 (\$7,084.00) Dollars,

or any other sum; and defendants deny all other allegations of said Paragraph V, except [13] as admitted herein.

V.

Answering Paragraph VI of said complaint, said answering defendants deny that they have at any time marketed fruit from Sun Grand nectarine trees; further answering said Paragraph VI, said answering defendants deny that they have sold Sun Grand nectarines during the 1957 marketing season or at any other time in the amount of Thirty-five Thousand and No/100 (\$35,000.00) Dollars, or in any other sum; still further answering said Paragraph VI, said answering defendants deny that in the year 1956, or that in any other year, that they sold substantial amounts, or any amount, of Sun Grand nectarines; further answering said paragraph, said answering defendants deny that plaintiff has suffered damages by reason of any act of said defendants in the sum of Thirty-five Thousand and No/100 (\$35,000.00) Dollars or any other sum; further answering said paragraph, said answering defendants deny that plaintiff has been damaged by reason of any act of said defendants in the sum of Seven Thousand Eighty-four and No/100 (\$7,084.00) Dollars, or any other sum, and defendants deny all other allegations of said Paragraph VI.

VI.

Answering Paragraph VII of said complaint, said answering defendants deny that they intend to bud or graft other trees to Sun Grand nectarines;

further answering said paragraph said answering defendants deny that they intend to produce or use, or sell Sun Grand nectarine trees without plaintiff's consent.

Wherefore, said defendants pray that the complaint on file be dismissed and that they be allowed their costs.

Dated: September 3, 1957.

WALCH & GRISWOLD,

By /s/ JAMES A. GRISWOLD,

Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed September 4, 1957. [14]

[Title of District Court and Cause.]

PROPOSED PRETRIAL
CONFERENCE ORDER

Following pretrial proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I. This is an action for an injunction to restrain alleged patent infringements, for an accounting of said patent infringements, for damages shown as the result of said accounting, by Kim Bros., a partnership, owner of the Patent, against L. A. Hagler and Mrs. L. A. Hagler, alleged patent

infringers, which issues are raised by the Complaint and Answer thereto.

II. Federal jurisdiction is invoked upon the ground of the Federal Plant Patent Statute 35, U.S.C.A., Sections 31 and 73, as amended in 1930.

III. The following facts are admitted:

(1) That the defendants, L. A. Hagler and Mrs. L. A. Hagler have owned a ranch in Tulare [16] County, at all times mentioned in the Complaint;

(2) That the defendants have growing on their ranch, plots of at least 968 trees and one of 220 trees and one of 672 trees, of which number of trees the defendants allege that they are of an independent variety of nectarines called "Red King," unpatented, and of which number of trees, the plaintiff claims that the same are Sun Grand Nectarine Trees, the same as his Plant Patent No. 974, and that the defendants have no license, permit or consent to maintain such trees; however, it is to be noted that plaintiff claims that the defendants have more than the above-described number of disputed trees growing on their ranch.

IV. The following issues of fact remain to be litigated: All of the allegations set forth in Paragraphs I, III, IV, V, VI and VII of said Complaint except as admissions of certain allegations of Paragraph V, as above described. In other words, the issues of fact are substantially as follows:

(1) The ownership of the Plant Patent No. 974, commonly referred to as the Sun Grand Nectarine and the assignment thereof from Frederick W. Anderson to Kim Bros.;

(2) Personal knowledge of defendant L. A. Hagler and Mrs. L. A. Hagler that plaintiff was the owner of Patent 974;

(3) The premium value of the Sun Grand Nectarine as a commercial fruit;

(4) The grafting, budding, propagating and maintaining of Sun Grand Nectarine by the defendants without consent of the Sun Grand Patent owner, to wit: Kim Bros.;

(5) The number and extent of said patent infringements, to wit: The number of alleged Sun Grand trees propagated and maintained by the defendants;

(6) The value of said trees; [17]

(7) The profits derived from the maintenance and sale of fruit from said trees;

(8) The question of whether any damages determined to exist in favor of the plaintiff, should be trebled, under the Patent Laws;

(9) A permanent injunction, restraining the defendants from using, producing or marketing Sun Grand Nectarine buds, scions or trees to the effective expiration date of said patent without the consent of the plaintiff.

V. The exhibits to be offered at the trial, insofar as are now known, consist of the following:

For the plaintiff:

(1) The Plant Patent No. 974, photostatic copy of which is attached to the Complaint, marked Exhibit "A";

(2) The Buy and Sell agreement, covering said patent, dated August 16, 1948, between Frederic W. Anderson and Kim Bros., and the actual assignment of said Patent, dated July 15, 1951, from the said Frederic W. Anderson to Kim Bros.;

(3) The Federal and State Marketing News Service Reports, of the California Department of Agriculture, and the U. S. Department of Commerce, for Thursday, July 18, 1957; Thursday, July 25, 1957; July 22, 1957, and July 30, 1957.

For the defendants:

(1) Seven invoices bearing Folio Numbers 4127, 1881, 1944, 7219, 4234, 4288 and 4944, relating to sales by plaintiff to Hunter Bros., Visalia, California;

(2) Sales Summary Sheet showing sales made by plaintiff to Hunter Bros., Visalia, California;

(3) Sales Summary consisting of two sheets showing sales by plaintiff to defendant L. A. Hagler, Visalia, California. [18]

The parties have stipulated that either party may introduce as evidence at time of trial exhibits other

than those listed herein provided notice is given to the opposite party at least 20 days prior to the time of trial and opportunity is given to inspect said exhibit or exhibits.

VI. No particular issues of law have as yet been raised in conferences between the parties.

VII. The foregoing admissions having been made by the parties and the parties having specified the foregoing issues of fact and law remaining to be litigated, this Order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: This 4th day of March, 1958.

/s/ GILBERT H. JERTBERG,
United States District Judge.

Approved as to form and content:

SAVAGE & SHEPARD,

By /s/ RICHARD L. SHEPARD,
Attorneys for Plaintiff.

GARETH W. HOUK,
WALCH & GRISWOLD,

By /s/ LYMAN GRISWOLD,
Attorneys for Defendants.

[Endorsed]: Filed March 3, 1958. [19]

[Title of District Court and Cause.]

OPINION

Appearances:

For the Plaintiff:

SAVAGE & SHEPARD, by
H. A. SAVAGE, and
RICHARD L. SHEPARD.

For the Defendant:

WALCH & GRISWOLD, and
GARETH W. HOUK, by
LYMAN GRISWOLD, and
GARETH W. HOUK. [25]

Yankwich, Chief Judge.

By the complaint, plaintiff Kim Bros., a partnership, seeks injunctive relief and damages in the sum of \$7,084.00, the value of the trees, in addition the sum of \$35,000.00, the value of the crops, to be trebled, and accounting from the defendant, L. A. Hagler, for alleged infringement of U. S. plant patent 974 for nectarine trees, issued on August 22, 1950, to Frederic W. Anderson, who assigned it to the plaintiff. [35 U.S.C.A., § 281.] The defendant has denied infringement. His more specific defense set forth in the pretrial order, dated March 3, 1958, is:

“That the defendants have growing on their ranch, plots of at least 968 trees and one of 220 trees and one of 672 trees, of which num-

ber of trees the defendants allege that they are of an independent variety of nectarines called 'Red King.' "

At the trial there was also introduced in evidence defendant's plant patent 1718 for a nectarine tree, issued to the defendant on June 10, 1958, application for which was filed on October 28, 1957. Neither the pleadings nor the evidence challenge the validity of the plaintiff's patent. So the statutory presumption of validity must be given full scope. [35 U.S.C.A., § 282; *Patterson-Ballagh Corp. v. Moss*, 9 Cir., 1953, 201 F. 2d 403, 406.]

The problem to resolve is whether there is infringement. [26] Before stating the conclusion reached on this issue, it is well to make some general observations as to the nature of the patent in suit. The patent was granted under a special statute which provides that:

"Whoever invents or discovers and asexually reproduces any distinct and new variety of plant, including cultivated sports, mutants, hybrids, and newly found seedlings."

with certain exceptions, may obtain a patent which gives him:

"The right to exclude others from asexually reproducing the plant or selling or using the plant so reproduced." [35 U.S.C.A., § 163.]

Because of the difficulty of properly describing a plant, the Congress has waived the provisions of

§ 112 of Title 35 and provided that no plant patent shall be declared invalid for noncompliance with that section

“if the description is as complete as is reasonably possible.” [35 U.S.C.A., § 162.]

In view of the discussion to follow, the rules established by the Patent Office are of interest. They require that the specification contain

“as full and complete a disclosure as possible of the plant and the characteristics thereof that distinguish the same over related known varieties, and its antecedents, and must particularly point out where and in what manner the variety of [27] plant has been asexually reproduced.” [35 U.S.C.A. (37 C.F.R., § 1.163).]

Only one claim is permitted and this is required to be

“in formal terms to the new and distinct variety of the specified plant as described and illustrated, and may also recite the principal distinguishing characteristics.” [35 U.S.C.A.; (37 C.F.R., § 1.164).]

There is also the requirement that plant patent drawings be “artistically and competently executed”; the drawing may be in color “when color is a distinguishing characteristic of the new variety.” [35 U.S.C.A. (37 C.F.R., § 1.165).] Specimens of the plant, or its flower or fruit, in a quantity and at a time in its stage of growth as may be designated, must be furnished, if required, for study and inspection. [35 U.S.C.A. (C.F.R.,

§ 1.166).] To secure the benefits of the statute, the patentee must (1) invent or discover a new and distinct variety of plant and (2) he must reproduce it asexually. The word "plant" is used in the popular and not in the scientific sense. [In *re* *Arzberger*, 27 C.C.P.A., 1940, 112 F. 2d 834, 837.] The object of the enactment was to give to the inventor

"an exclusive right to propagate that plant by asexually reproduction; that is, by grafting, budding, cutting, layering, division, and the like, but not by seeds. [See the report of the House Committee on Patents as quoted in *In Re Arzberger*, *supra*, at page 837.]

The courts have construed this statute strictly so as to confine [28] its benefits to plant life as it is understood in the common language of the people. [Cole Nursery Co. v. Youdath Perennial Gardens, 1936, Dist. Ct., Ohio, 17 Fed. Supp. 159; Bourne v. Jones, Dist. Ct., Fla., 1951, 114 F. Supp. 413, 418, affirmed in Bourne v. Jones, 1953, 5 Cir., 207 F. 2d 173, the Court of Appeals adopting the opinion as its own.]

The patentee who charges infringement is entitled to the presumption of validity. From such presumption no inference of infringement arises. On the contrary, he who charges infringement has the burden of proving it. [69 C.J.S., Patents, § 325; *Macite Corp. v. Davison*, 1954, U. S. App., D. C., 211 F. 2d 650.] Except for the purpose of increasing damages when the infringement is wil-

ful, knowledge or intent is not material. [35 U.S.C.A., § 284; 69 C.J.S., Patent, § 285; *Artmoore Co. v. Dayless Mfg. Co.*, 1953, 208 F. 2d 1, 4-5; *E-I-M Company v. Philadelphia Gear Works*, 5 Cir., 1955, 223 F. 2d 36, 42.]

In the light of what precedes, the solution of the problem of infringement before us is not difficult. In considering the invention, we take cognizance of the fact that the nectarine is a smooth-skinned peach and that a large variety of them exists in the world market. Plaintiff's assignor Anderson, himself, is the patentee of a number of them. This in itself means that the Patent Office will allow a patent for a deviant plant when it is shown to have a few characteristics which distinguish it from others. Anderson, in his patent, claimed only three characteristics [29] for the Sun Grand variety which is covered by the patent in suit:

“1. Its earlier ripening period with respect to other commercial varieties of yellow fleshed nectarines.

“2. Its larger size than the same.

“3. Its superior shipping and eating qualities.”

The single claim is brief and stresses these three characteristics:

“A new and distinct variety of nectarine tree substantially as described and illustrated bearing yellow fleshed freestone fruit characterized by a ripening period between the white fleshed

John Rivers and Grower varieties; approximately two weeks earlier than the yellow fleshed Kim or Bim varieties; and approximately three weeks earlier than the yellow fleshed Le Grand variety; its firm flesh; its relatively larger size; and its superior shipping and eating qualities."

The complaint charged wilful and deliberate violation of the patent rights of the plaintiff and characterized the acts of the defendant as "secret" and "clandestine" and done with "deliberate intent," the proof showed that whatever actions the defendant took in growing the variety they now call "Red King" were open and notorious. There is no credible evidence that the appearance of the branch on what we called, at the [30] trial, the "accused tree," in an orchard other than that of the defendant, and situated across the road from his, was the result of any grafting or budding of a branch or bud from the plaintiff's patented tree. There is a hearsay statement quoting Joseph E. Hunter, the owner of the orchard in which the "accused tree" was found, as saying that two persons, Robert Milton Riesner and Roy Milton Riesner, "may have done it." But they, when called as witnesses by the defendant, testified under oath that they were not on the Hunter Ranch in 1954 at the time the alleged branch first appeared, carrying the new variety which the defendant claims as a sport and which he has patented. Indeed, they testified that the first time they went on the place

was a year later. Their testimony stands uncontradicted. And every one of the persons who could have grafted the tree or budded it with the plaintiff's variety, Hunter, Hagler and their employees, denied such act under oath. It is true that even if the original grafting was an unauthorized and an unreported act committed, designedly or by mistake, by the plaintiff's own employees, it might still be an infringement, if the defendant took the buds and budded other trees. However, in a case of this character, in which it is sought to recover as damages not only the alleged value of the trees planted but also the value of the nectarine crop sold to date by the defendant, to be trebled; and an injunction and an accounting are demanded to prevent or ascertain future damages, it is proper to call attention to the disparity between certain broad allegations on this subject in the complaint and the scant proof in the record. The absence of wilfulness, of [31] course, would call for the denial of treble damages only. [35 U.S.C.A., § 284; *Artmoore Co. v. Dayless Mfg. Co.*, *supra*; *E-I-M Company v. Philadelphia Gear Works*, *supra*.] However, we are of the view that the plaintiff has failed to prove that the trees grown by the defendant were the result of the appropriation by the defendant of the plaintiff's Sun Grand patent or that, to be more specific, during the year 1955 the defendant grafted Sun Grand nectarine scions on other fruit trees, or that in the year 1956 he budded trees of the same variety covered by the plaintiff's patent. We are also of the view that the evidence in the

record warrants the conclusion that the trees of the defendant were the result of a sport or deviant and are of an independent variety named "Red King," as developed by him and covered by plant patent 1718, filed October 28, 1957, and issued on June 10, 1958.

No pleading has challenged the validity of the defendant's patent, knowledge of which was conveyed to plaintiff before suit. No written notice, as required by statute was given to them. However, the court absolved the defendant of the default as permitted by the statute. [35 U.S.C.A., § 282.] And the defendant is entitled to the same presumption of validity as the plaintiff. [35 U.S.C.A., § 282.] The Supreme Court has stated:

"The issue of the patent is enough to show, until the contrary appears, that all the conditions under which a discovery is patentable in accordance with the statutes have been met. Hence, the [32] burden of proving want of novelty is upon him who avers it. Walker on Patents, § 116. Not only is the burden to make good this defense upon the party setting it up, but his burden is a heavy one, as it has been held that 'every reasonable doubt should be resolved against him.'" [Mumm v. Decker & Sons, 1937, 301 U. S. 168, 171.]

Our own Court of Appeals has given the reason for the presumption arising from the Congressional enactment:

“The presumption created by the action of the Patent Office is the result of the expertness of an administrative body acting within its specific field and can be overcome only by clear and convincing proof.” [Patterson-Ballagh Corp. v. Moss, 9 Cir., 1953, 201 F. 2d 403, 406.]

This language is especially appropriate to the situation which confronts us here. The Congress in enacting the provisions for the patenting of plants, 35 U.S.C.A., 161, et seq., has, of necessity, been compelled to dispense with the many rigid requirements as to the specifications, thus giving broad latitude to the administrative procedures in the Patent Office. And the regulations already referred to indicate that the Patent Office, aware of its responsibility, has made the added requirements as to specifications, drawings, color photography, and actual supply of specimens for inspection and comparison. [33] In this manner, when they, with the knowledge of the field and of the prior art were satisfied that, in the crowded field of nectarines, the defendant had developed, from a sport or mutant, a nectarine which had sufficient new characteristics to amount to invention, their finding should be given due weight. The evidence in the record confirms the correctness of the determination of the Patent Office. For I am satisfied that the credible evidence warrants the conclusion that the nectarine grown by the defendant differs in coloration from that of the plaintiff. An examination of the actual fruit and the photographs in-

troduced shows clearly the difference in coloration between the defendant's fruit which is reddish, and the plaintiff's fruit, which is orange. There is similar difference in coloration in the pit cavity of the fruit, the defendant's fruit having a reddish color around the pit. The fruits differ in size and shape as do also the pits. And there are also marked differences in the leaves as to shape, color and the glands on them. Because only two crops of the defendant's fruit have been harvested, the evidence as to earlier ripening could not be established with the same certainty with which the ripening period of an older variety could be established. However, I am convinced that, on the whole, the evidence sustains the conclusion that the defendant's variety ripens five or six days earlier than the fruit of its parent variety Le Grand, as claimed in the defendant's patent. [34]

The object of the statute relating to plant patents was declared by the Committee on Patents of the House of Representatives which reported the bill, to be,

“to afford agriculture, so far as practicable, the same opportunity to participate in the benefits of the patent system as has been given industry, and thus assist in placing agriculture on a basis of economic equality with industry.”
[As quoted in *In Re Arzberger*, *supra*, page 837.]

The fact that so many varieties are recognized as to one tree and that the plaintiff himself has ob-

tained patents on a large number of them on a showing of minor differences in the tree and the fruit, is proof that it would be contrary to the intention of the Congress to allow one patentee to claim a monopoly of the field so as to exclude other trees clearly different in their appearance and structure and unequivocally shown to be the product of a sport or mutation. Judges who have been called upon to interpret this statute have hesitated to find infringement in the absence of clear and convincing proof. Thus Judge Jones of the Northern District of Ohio, in a similar situation, wrote:

“From a consideration of all of the evidence upon that subject, I feel unable to say that it would be impossible to reproduce or duplicate substantially the character of plant of the plaintiff without cuttings from the Horvath plants. Conceding that the plants of the [35] plaintiff and of the defendants have similar characteristics, the proof is not clear and convincing that the plaintiff must have appropriated plants or cuttings belonging to Horvath or his assignee.” [Cole Nursery Co. v. Youdath Perennial Gardens, *supra*, page 160.]

In the present case, I am of the view that not only has the plaintiff failed to prove by clear and convincing proof that the trees grown by the defendant are an infringement upon his patent, but, on the contrary, there is ample proof to show that the trees grown by the plaintiff were a sport or mutation of the Le Grand tree. This conclusion is not

in any way weakened by the testimony in the record given by a well-known scientist in the field of genetics that sports or mutations in the nectarine field are rare. Rarity of occurrence does not stand in the way of recognizing the incidence of mutation and the consequent development of a new plant. Indeed, the enactment of this very statute presupposed the possibility of mutations. In one of the reported cases, *Bourne v. Jones*, Dist. Ct. Fla., 1951, 114 F. Supp. 413, 418, it is reported that "a million seedlings" of sugar cane were tested to find "only twenty new varieties that were worthwhile," and that the three patented varieties "were selected from literally thousands of seedlings" and plants grown from them. So long as mutation is in the realm of possibility, on the facts before me I am of the view that the evidence in the record warrants the conclusion that we have before us one such rarity, i.e., trees grown by the defendant not from grafts or buds appropriated from the plaintiff's patented tree, but as a sport or mutation. The inventor of the patented plant, Frederic W. Anderson, admitted the possibility of the type of mutation which is claimed here. To quote from the record:

"By Mr. Griswold:

Q. That is one way, mutation, is it not, that new varieties are brought into existence, into being? A. Yes.

The Court: Go ahead, you may explain. You hesitated. You may give a reason.

A. Yes. I think I made the explanation

when we discussed mutation, mutations cover a broader field. This they said was a bud sport. Now a bud sport is a mutation, but it is a special kind of a mutation that comes only from buds.

“By Mr. Griswold:

Q. Am I correct that if a nectarine was a mutation that it would be extremely remote, if not impossible, to be the same plant patent No. 974?

A. Yes, you are wholly correct.

974? A. Yes, you are wholly correct.

Q. So, in other words, the chance of a mutation having all the characteristics of your plant patent 974 is impossible, or could we go that far? A. It is going very far.

The Court: I presume ‘remote’ would be a better word.

The Witness: Yes, extremely remote. It has never happened in the history of horticulture, but that is not saying that it couldn’t be some place.’ (Emphasis added.)

Truly, in the words of Ecclesiastes, there came to the defendant “a time to plant, and a time to pluck up that which is planted.” (Ecclesiastes 3:2.) It is true that

“He who discovers a hitherto unknown phenomenon of nature has no claim to a monopoly of it which the law recognizes.” [Funk Bros. Seed Co. v. KaloCo., 1948, 333 U.S. 127, 130.]

Nevertheless, the Congress has seen fit to grant a patent monopoly to those who produce new plants by

“grafting, budding, cuttings, layering, division, and the like, but not by seeds.” [House Committee on Patents as quoted in *In Re Arzberger*, *supra*, page 837.]

So that even if it be assumed that the validity of the defendant's patent could be open to challenge in a proper proceeding, the conclusion is warranted that the proof in the record shows that the plants grown by the defendant were developed by him from a sport or mutation and not by an appropriation or use of the plaintiff's patent.

In sum, nature has bestowed on the defendant agriculturist one of its rare gifts, a plant mutation. He, having grown from it the variant trees by the asexual means provided in the statute, should not be deprived of the increments of the gift and of his own skill in growing from it a new plant producing a different fruit of the nectarine variety, by a broad judicial interpretation of the limited claim in the plaintiff's patent. Progress in the agricultural field, as in other fields, lies more in the encouragement of experimental and competitive variation rather than in upholding rigid and monopolistic uniformity in a single and crowded plant field. Thus the work of nature is aided. For has it not been written:

“God moves in a mysterious way, His wonders to perform?” [Light Shining Out of

Darkness, by William Cowper, as quoted in Familiar Quotations by John Bartlett, 11th ed., 1937, page 266.]

Judgement will, therefore, be for the defendant, that plaintiff take nothing by its complaint. Costs to the defendant. Formal findings and judgment to be prepared by counsel for the defendant under Local Rule 7.

Dated: November 21, 1958.

/s/ LEON R. YANKWICH,
Chief Judge, United States
District Court.

[Endorsed]: Filed November 21, 1958.

In the United States District Court, for the Southern District of California, Northern District
No. 1793-ND—Civil

KIM BROS., a Partnership,

Plaintiff,

vs.

L. A. HAGLER and MRS. L. A. HAGLER, et al.,
Defendants.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND JUDGMENT

The above-entitled cause came on regularly for trial, commencing on the 4th day of November,

1958, before the above-entitled Court, sitting without a jury, Savage & Shepard, by H. A. Savage and Richard L. Shepard appearing for the plaintiff, and Walch & Griswold and Gareth W. Houk, by Lyman D. Griswold and Gareth W. Houk, appearing for the defendants, and evidence, both oral and documentary, having been introduced and the matter having been submitted to the Court for its decision and the Court having heretofore on the 21st day of November, 1958, filed its opinion, the Court now finds the facts and states the conclusions of law as follows:

Findings of Fact

1. The nectarine is a smooth skinned peach.
2. A large variety of nectarines exist in the world market.
3. The United States Patent Office will allow a patent for a deviant plant where it is shown to have a few characteristics which distinguish it from other plants.
4. Plaintiffs patented variety known as the "Sun Grand," U. S. Plant Patent No. 974 for nectarine trees issued on August 22, 1950, to Frederic W. Anderson, has the following characteristics:
 - a. An early ripening period, with respect to other commercial varieties of yellow fleshed nectarines.

- b. A larger size than the same.
- c. Superior shipping and eating qualities.
5. There was no grafting or budding of a branch or bud from plaintiff's patented tree to any other tree by the defendants, their agents, servants or employees.
6. The nectarine trees grown by the defendants were not the result of appropriation by defendants, their agents, servants, or employees, of plaintiff's Sun Grand patent.
7. During the year 1955, defendants, their agents, servants or employees, did not graft Sun Grand Nectarine Scions on other fruit trees.
8. In 1956, defendants, their agents, servants, or employees, did not bud trees of the same variety as covered by plaintiff's patent.
9. The trees of defendants were the result of a sport or deviant.
10. The trees of defendants are of an independent variety named "Red King."
11. The trees of the defendants were developed by defendants and covered by U. S. Plant Patent No. 1718, filed October 28, 1957, and issued on June 10, 1958.
12. The nectarines grown by defendants under U. S. Plant Patent No. 1718 differ from those of plaintiff grown under U. S. Plant Patent No. 974 in the following respects and particulars:

- a. Coloration of fruit.
- b. Coloration of pit cavity.
- c. Size and shape of fruit.
- d. Size and shape of pits.
- e. Difference in leaves as to shape, color, and glands.

13. The nectarines grown by defendants under U. S. Plant Patent No. 1718 ripen five or six days earlier than the fruit of its parent variety, "Le-Grand."

Conclusions of Law

1. There has been no infringement of plaintiff's U. S. Plant Patent No 974, issued on August 22, 1950, to Frederic W. Anderson.

2. Plaintiff has suffered no damages in this action.

Judgment

In accordance with the foregoing findings of fact and conclusions of law, It is Ordered, Adjudged and Decreed:

That plaintiff do have and recover nothing from the defendants by reason of this action against said defendants; that said action be and the same is hereby dismissed on the merits and that the defendants do have and recover of and from the plaintiff their costs in this action in the amount of \$242.80.

Dated December 15, 1958.

/s/ LEON R. YANKWICH,
Chief Judge, United States
District Court.

Affidavit of service by mail attached.

Lodged November 26, 1958.

[Endorsed]: Filed December 5, 1958.

Entered December 8, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL TO COURT OF AP-
PEALS UNDER RULE 73-B

Notice is Hereby Given, that Kim Bros., a partnership, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Final Judgment entered in this action, on December 8, 1958.

Dated: This 11th day of December, 1958.

SAVAGE & SHEPARD,

By /s/ H. A. SAVAGE,
Attorneys for Appellant.

Affidavit of service by mail attached.

[Endorsed]: Filed December 18, 1958.

In the United States District Court, Southern
District of California, Northern Division
No. 1793-ND—Civil

KIM BROTHERS, a Partnership,
Plaintiff,

vs.

L. A. HAGLER,
Defendant.

Honorable Leon R. Yankwich, Chief Judge presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Appearances:

For the Plaintiff:

SAVAGE & SHEPARD By
H. A. SAVAGE, ESQ. and
RICHARD L. SHEPARD, ESQ.

For the Defendant:

WALCH & GRISWOLD and
GARETH W. HOUK by
LYMAN GRISWOLD, ESQ. and
GARETH W. HOUK, ESQ.

November 4, 1958—10:00 A.M.

The Clerk: 1793, Kim Brothers v. Hagler, for trial.

Mr. Shepard: Ready for plaintiff, your Honor.

Mr. Griswold: Defendant is ready.

The Court: Gentlemen, as I informed you in chambers, I familiarized myself with the pleadings in the case. As I also informed you, as is the rule in patent cases, the only question we will go into is the problem of infringement, and of course that implies also the problem of validity. We will not go into the question of any damages, because under the practice which obtains in patent cases the problem of damages is usually left for determination by a master later on, after the interlocutory decree has become final. Of course, if the Court finds the patent is not valid, or if valid not infringed, we never reach the problem of damages, but even if the Court finds that the patent is valid and infringed, the general rule is, as I pointed out to you, by reference to one of my brief opinions, *Elrick Rim Co. v. Reading Tire Machinery Co.*, decided December 5, 1957, and reported in 157 Fed. Sup. 60, the order usually provides that the matter of damages be deferred, to be referred to a master at such time as the decree has become final. Of course, the opposite situation is that which obtained in another opinion of mine which is also filed, and that is [3] *Everlube v. Electrofilm*, 1954 Fed. Sup. 788, and the same rule has been followed consistently. There is only one exception to the rule, and that is in a case involving a coin machine, where after the judgment had become final I decided we would gain time if I myself heard the testimony relating to damages, but that was caused by the fact that the

*Page numbering appearing at top of page of original Reporter's Transcript of Record.

defendant had kept no books, and therefore it was necessary, more or less, to approximate the profits that he made as a basis for damages. So with my statement on the record, and the informal discussion we had, we are ready to proceed. If you desire to make an opening statement I will be very glad to have you do so.

OPENING STATEMENT ON BEHALF OF PLAINTIFF

Mr. Shepard: Your Honor please, Richard Shepard for the plaintiff. I would like to make a brief opening statement. I appreciate that you read the pleadings and are probably familiar with the issues which were set forth in the pretrial order of Judge Jertberg, sometime ago, last May, I believe.

A word about the pleadings, we feel that no particular issue as to the validity of this patent has been raised, and as we understand it any defenses involving the validity of the patent must be raised and separately pleaded, and there have been none specially pleaded.

The only issue on the patent seems to be the ownership, and whether the patent was regularly issued to the assignor of [4] the plaintiff and the plaintiff.

With that word, and a word about the action involving the infringement of a plant patent, we might as well say at the outset that we feel that this is going to be a case of perhaps first impression. We are going to show the issuance of a plant pat-

ent 974, as we have pleaded, and that it was regularly issued on about August 22, 1950, to Frederic W. Anderson, and for the sake of brevity and nomenclature, if it permissible, that patent has been continually and at all times referred to as a Sun Grand nectarine, and rather than speak of patent 974, whenever we refer to a Sun Grand nectarine we will be referring to this patent 974. We will show that this patent was granted on August 22, 1950, that thereafter, about January, 1951, it was regularly and duly assigned by the then owner of the patent to Kim Brothers, a partnership, who are also known sometimes as the Reedley Nursery, but who are formally pleaded as Kim Brothers, a partnership; and that as soon as it was regularly at issue, and within a few months after its assignment, the nectarines covered by this patent were propagated by the assignee, Kim Brothers, and they were commenced in regular market, being sold from their nursery in Reedley, California, here in Fresno County, and that at all times, of course, they had been regularly labeled as being a patented product.

Briefly, we will show that the Sun Grand nectarine has [5] become one of the most popular nectarines in California, even if we are not going to go into the value of it at the present time, and that great quantities of this Sun Grand nectarine have been sold through regular individual licenses and sales by Reedley Nursery to various growers throughout the Valley, and that it became a heavy shipper in the fruit industry among nectarines, and

that at least by this year, 1958, when the first officially compiled statistics of California production were got together in the California Tree Fruit Agreement, an official government body, by this time Sun Grands were high among the nectarines shipped in quantity.

We hope to show the Court, and I think the Court will realize on a moment's reflection, that there is a number of years between the planting or propagating of a nectarine, or any tree fruit, and the actual harvesting of the fruit, and that for the purposes of marketing and making a profit from the nectarine trees approximately at least three and probably a minimum of four years must elapse before the tree is heavily producing, or substantially producing.

The Court: Well, that is true of even the natural citrus trees.

Mr. Shepard: That is true, your Honor, and I point that out and appreciate that your Honor does appreciate the fact, as distinguished from mechanical patents. [6]

The Court: I am familiar with that. I came from this part of California. I began practicing law in 1909 in Stanislaus County, and I have had a good deal of experience in dealing with agricultural products. In fact, one of the patents I tried in Los Angeles related to a potato sacker, many years ago.

Mr. Shepard: At any rate, we want to point out through witnesses to the Court that there is a lag in number of years between the propagation and harvesting, and also a certain lag in years before

a fruit can be positively identified. And so in this case, we will show that the assignee of the patent, Kim Brothers, did not at any time give to the defendant, L. A. Hagler, a license to grow Sun Grand nectarines, or a license to use the plant patent 974, but notwithstanding this lack of license from the exclusive owner and holder of the patent we will show that it came to our attention in 1957, shortly before the issuance of this complaint, that the defendant L. A. Hagler had on his ranch a substantial quantity of trees, which after inspection our witnesses determined to be Sun Grand nectarines.

I call to the Court's attention the fact that the defendant Hagler has admitted that he has a certain number of nectarines, which he calls Red King, that he has blocks, one of approximately 968 trees, one of a little over 200 trees, and another of some 672 trees, and it is these blocks [7] of trees on his ranch that our witnesses will describe and identify as Sun Grand nectarines, or as the same nectarine as under plant patent 974.

Now, the Court has intimated or has instructed that the problem of damages will properly be reserved until after the finish of this trial, if there are any damages to be assessed at all. However, it would be our opinion, subject to the Court's wishes, that the matter of treble damages under the statute which we have pleaded should be a matter for the Court to look into at this hearing.

The Court: Well, the Court, in determining whether damages are allowed, determines on the facts whether there has been——

Mr. Shepard: Wilful?

The Court: —wilful infringement, and in the very case to which I called your attention, I determined that in the light of the facts the damages should be limited to a single amount. That doesn't require going into the exact figures.

Mr. Shepard: That was my understanding, your Honor, but I wanted to make myself clear.

The Court: That is all right.

Mr. Shepard: Now, we have pleaded wilfulness, and in order to show the wilfulness, wilful infringement of the patent as we allege, we will put on evidence (1) to show, contrary to defendant's pleading, that the defendant knew [8] that the Kim Brothers, the plaintiff, were owners of the plant patent 974. We will also put on evidence to show that they were familiar with Kim Brothers being owners of a large number of other nectarine patents.

The Court: That itself does not produce wilfulness.

Mr. Shepard: I realize that.

The Court: Wilfulness there is implied, for instance, as a man who has had no experience in the field deliberately going out and taking the product, or an employee formerly employed going out and imitating it, because knowledge itself doesn't mean anything. Mere knowledge is no defense. It isn't like in copyright. In copyright there is such a thing as conceiving a thing independently, and in patents the law doesn't recognize that. Even if you conceived it independently, the mere fact that some-

body else did it before you makes you an infringer.

Mr. Shepard: That is correct. Now, your Honor——

The Court: I don't want you to go into detail. Even when I try a case with a jury I don't believe in conditioning a jury, and you can't condition a judge. I don't believe in going into detail what you are going to prove. I want you to generally outline your proof, without going into the specific type of testimony that you think will prove this or another fact. Otherwise, the opening statement becomes an argument, which isn't proper, until such time as [9] all the evidence is in and the Court is ready to hear argument.

Mr. Shepard: I merely want to give the Court a sort of bird's eye view of what is involved here, so that the Court can fit it in as it comes along. Now, what I started to say is, we expect to show that the defendant wilfully infringed on the patent, and we expect to show as one of those elements that he had infringed on other patents of the plaintiff previously, and that there was a scheme and device to defeat the plaintiff's patent in this case. We expect most of our testimony to rest on expert witnesses, and a good deal of it may involve rebuttal of the defendant's witnesses, of such evidence as they have.

The Court: Well, that is all right. I don't permit rebuttal testimony to go in as a part of the plaintiff's case, because many a time issues are raised which are not pressed.

Mr. Shepard: That is right, your Honor, and

for that reason we are going to put on our direct case of identification of the trees, and that will be our principal direct case.

The Court: All right. Do you gentlemen desire to make an opening statement? I think it would be helpful because the pleadings are mostly denial. There are no affirmative defenses, so I would be very glad to hear from you, any of you gentlemen, Mr. Griswold or Mr. Houk, what your real contention is, because the pretrial order which I have read, [10] indicates more issues than are to be pressed. Ultimately a pretrial order aims to overstate rather than limit, at times, the issues. Counsel always seem to be fearful that perhaps they have limited themselves too much by pretrial orders.

Opening Statement on Behalf of Defendant

Mr. Griswold: If the Court please, I can agree with counsel for the plaintiff that actually the name Sun Grand in this case could be labeled Sun Grand v. Red King, and that will be undoubtedly the descriptive words that will be used by the witnesses throughout this case, that is, the Sun Grand being the patent 974, and the variety which the defendant claims is a non-infringement as Red King.

Now, we agree that the principal issue here is one of a question of infringement, and it will be readily apparent to the Court that the heart of this case is whether or not the defendant is the posses-

sor of a distinct and new variety of plant, under 35 U. S. Code 161, which is the basic right granted in the issuing of patents, because in our general denial and subsequent to the filing of this suit there has been granted to the defendant, Lyle Hagler, plant patent No. 1718, granted June 10, 1958, which covers the variety which in our position is that it is a new and distinct variety of nectarine, and does not infringe and raises a presumption, as a matter of fact, that it is a new [11] and distinct variety by reason of the granting of the patent.

Just to outline very briefly, it is our position and proof that in 1954 the defendant in a cultivated orchard under his supervision, near Visalia, Tulare County, California, while he was picking in a LeGrand orchard under his supervision, he discovered a sport on a LeGrand nectarine tree, and that it is our proof and will be our proof that at no time or place did we ever acquire a Sun Grand bud or Sun Grand limb, or anything of the Sun Grand, or any part of patent 974, and that every tree which it is claimed by the plaintiff that we are growing, which they claim to be Sun Grand, came from this sport, from this single tree on this orchard near Visalia, California, and consequently this is the variety which we now hold a patent on, and it is biologically and botanically impossible that this sport could be an infringement of the patented variety Sun Grand as claimed by 974.

As the Court undoubtedly will hear, this nectarine is a smooth skinned peach, the fruit has been

known for 2,000 years, and is often referred to as the classical example of bud and seed variation.

We are prepared further, through the use of photographs and verbal testimony, and also economic factors, to show that the Red King is different in many respects, and we believe will be obvious to the trier of facts when a visual [12] presentation is made as to the differences between these two. So that under our general denial, it is our position that at no time and place have we ever taken any of the Sun Grand buds, or any part of the Sun Grand, and that this Red King, which is our patent, is wholly separate and distinct and represents a new and patentable variety.

Mr. Shepard: Your Honor, I didn't want to interrupt counsel's argument, and I hope you appreciate I didn't do so out of courtesy. We will object, however, to any mention or introduction of this so-called Red King plant patent 1718, which has just been mentioned for the first time in these proceedings. I think it was issued June 10, 1958. We object to the reference to the same, and any attempt to use the same, or presumptions thereto, as being not pleaded, not within the scope of the pretrial order, and——

The Court: They can always show as a part of the general denial that the process they are using is not your process.

Mr. Shepard: That is correct, your Honor, but——

The Court: Furthermore, you must bear in mind, this is a very limited patent as to plants, as

provided in Section 61, and it is always permissible under the general denial to show that the process of the defendant is not the process of the plaintiff.

Mr. Shepard: That is true, your Honor, but we feel that [13] under the Court's rules and the pre-trial issues here that no mention has ever been made of this patent to date. We have no objection, and expect the defendants to attempt to show how their tree differs, but we object to them bringing in a patent and saying that that covers their tree, when they have never mentioned it to date.

The Court: Well, they are pleading a different plant, whether they are using it under a patent or not doesn't make any difference. They are not required to give you notice. If you read the section as to notice, notice is required only in cases where they are attacking the validity of the patent, when they are required to show you the patent on which they are relying; but they can always show on general denial that what they are doing is a different process which they have also patented.

Mr. Shepard: Well, your Honor, it seems to me that when this patent is raised for the first time, we have very little opportunity, if any——

The Court: That doesn't make any difference. You are supposed to come into court ready to defend it.

Mr. Shepard: We are ready to defend our patent.

The Court: There is no requirement requiring notice.

Mr. Shepard: I call the Court's attention to the pretrial order——

The Court: The pretrial order says specifically that [14] they are denying all of your paragraphs I to VIII, and the paragraphs I to VIII are the paragraphs in which you allege that they are budding trees, according to your patent.

Mr. Shepard: I am specifically referring to that section of the pretrial order——

The Court: Just a minute, let's look at the pretrial order.

Mr. Shepard: Paragraph V, and the last sentence of that paragraph on the last page of the order.

The Court: Find the pretrial order for me.

Mr. Griswold: If the Court please, we will offer, of course, a certified copy at a proper time, but at this time we have made no offer in evidence.

The Court: We might just as well discuss the scope so we will have an understanding of what we are going to do. You mean the paragraph at the top of page 4, as to notice?

Mr. Shepard: Yes, your Honor.

The Court: However, the object of pretrial is to clarify issues, and as the case proceeds if you are taken by surprise, this being a non-jury case, the Court can keep it open so as to give you an opportunity. The object of pretrial is to crystallize issues, but not to freeze them to such an extent that the defendant is deprived of an opportunity of presenting his claim. Regardless of any patent, the defendant would be permitted as a defense to [15]

show that his product is different. As a matter of fact, the subdivision 4 on line 27 leaves open the issue, "The grafting, budding, propagating and maintaining of Sun Grand nectarine by the defendants without consent," under that, they not only can prove a negative, they can prove a positive. They can prove that they are grafting according to an entirely different patent, just as in the case I mentioned to you in chambers. It was a case under a license. The validity of the patent was involved, but the question of infringement didn't come before the court, and there the defendant proved that they weren't using it. So in this particular case, even assuming that they can't plead a patent because they haven't given any notice, they can still show that the nectarine they are producing is an entirely different product than yours.

Mr. Shepard: I have no argument with that, your Honor, but that is different from showing they are shielded by a patent, a paper patent which they have——

The Court: I will allow them to do even that, subject to giving you notice. If you are taken by surprise I will give you time for rebuttal later on. I am not going to interrupt the trial or continue it at the present time.

Mr. Griswold: If the Court please, my co-counsel, Mr. Houk, states that in June, I think, he told Mr. Shepard that we had a patent on the Red King variety. Is that right, [16] Mr. Shepard?

Mr. Shepard: Yes, and he gave me no opportunity to examine it. Furthermore, he didn't give

me the number; he gave me no intimation you were going to use it in the trial.

The Court: At this time we will proceed with the case, and if counsel has been taken by surprise by this patent, then I will take proper action to relieve him of surprise. I have a right to amend the order, and that order is not a Draconian law. A pretrial is supposed to aid the expeditious determination of issues; it is not supposed to be a means of preventing a person from presenting a proper defense.

Mr. Shepard: I grant you that.

The Court: All right. If it were a statutory notice—that was a voluntary thing on their part, and on your part, saying we are not going to use any exhibits. As a matter of fact, this is no criticism, although the rule requires exhibits to be set forth, in no pretrial order that I handle do I limit the parties to exhibits. If I do, I merely say other reservations being made. I remember trying a case in Oregon, a patent case, and they identified 175 exhibits, it took them three days to just go through the motion of identifying them. Then I ruled out certain defenses, and the result was that a lot of the time we had taken in pretrial was absolutely wasted, because the pretrial had not [17] determined the scope of the defense.

Mr. Shepard: Your Honor, that is one of the reasons I brought it up. I am sure the defendant, and I will admit we have certain exhibits that we have not listed in the pretrial order, and rather than have them object to ours because we have not

displayed them to them, I am sure the pictures they know about, I wanted to set the record straight by objecting to theirs on the basis of——

The Court: I want to say, gentlemen, that regardless of any undertaking, if I believe, in my opinion, that those exhibits are available, I shall exercise the prerogative of asking you to produce them. You want to remember this, gentlemen, the judge in a federal court is, even in a jury case, what Mr. Chief Justice Taft called “the governor of the trial,” so regardless of pretrial orders the Court, as the trier of the facts, may say, “I want this piece of evidence introduced.”

Mr. Shepard: Very good, your Honor.

The Court: All right.

Mr. Shepard: I just wanted to clairfy that before I start.

The Court: Let's try this lawsuit, and we will get to the defense when they present it.

Mr. Shepard: Very well, your Honor.

The Court: All right. Let's take a short recess before you call your first witness.

(Short recess.) [18]

The Court: Go ahead.

Mr. Savage: Mr. Frederic Anderson, will you take the stand, please?

FREDERIC W. ANDERSON

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Frederic W. Anderson.

Direct Examination

By Mr. Savage:

Q. Mr. Anderson, where do you live?

A. Merced, California.

Q. And how long have you lived there?

A. Since 1932.

Q. How old a man are you, Mr. Anderson?

A. Sixty-six years, born July 14, 1892.

Q. And will you please give to us your occupations and activities leading up to your background as a plant or tree propagator of new varieties?

A. Well, I am a fruit breeder and orchardist, if that is what you mean.

Q. Yes. I am more interested in your qualifications and background, education.

A. Well, I had the usual grammar and high school education, and then went to San Jose State Normal School, graduated [19] there in 1910, and taught school for approximately six years, and then went to the—during that period I became much interested in Luther Burbank's work. He was at the height of his popularity at that time, so I wanted to get into fruit breeding and orcharding,

(Testimony of Frederic W. Anderson.)

so I decided to go to the University of California, Department of Agriculture, and majored in pomology, and in fruit breeding as a minor. The war intervened in 1918, and I was in the army for a year, and then came back and finished my work at the University, graduated with a Bachelor of Science degree in 1919, and then wanting to get into the type of work I was interested in, applied for work in a nursery and went to work for Kirkman Nurseries here in Fresno in 1920, and——

Q. Just what was your activity for Kirkman Nurseries?

A. Well, at that time, that year, I just did, oh, all kinds of work in propagation and growing, anything from driving mules to irrigating, and all that sort of thing, and was only there, I think, less than a year, when I went and taught school at Ventura, and taught there for—taught agriculture in high school at Ventura for a year and a half, and then the nurserymen were organizing a bud selection association to select better fruit trees of each variety, and Mr. Kirkman wrote me and asked me if I would come and join them in that work, and that they would only be operating in the summer-time while they were cutting buds and that he [20] would employ me during the winter period when the bud selection setup wasn't operating. So I came back and went to work on that, and worked on that until 1932, when I went to farming for myself.

Q. In connection with this California Nursery Association, what was your responsibility, and ac-

(Testimony of Frederic W. Anderson.)

tivities there in connection with bud selection and plants?

A. Well, the first was to be certain that the variety the nurserymen were propagating were true to name, true to the variety, and then it was hoped that we would find bud sports of at least some of the varieties that would give better strains of the particular varieties, so we spent most of our time on that, and then making trees that we were sure were true to name, and preferably the best of their type.

Q. It was part of your duties then to segregate nurseries and tree plant fruit to be sure they were true to name and distinguishable by variety?

A. Yes; that is true, and we also cut the buds for the various nurserymen, members of the association, and in addition to that went over the nursery rows to attempt to detect mixtures. Mixtures occur because of errors of human beings all along the line in handling the buds and budding and cutting back, and even in labeling the rows, that sort of thing, so we gave considerable time to that. [21]

Q. In that connection, Mr. Anderson, did you find that there were certain characteristics even in the nursery stock, in the leaves that made the identification of certain varieties possible?

A. We couldn't make it absolutely positive. We could eliminate a great many mixtures, probably, oh, somewhere about 75 per cent of the mixtures. Now, we haven't very many things to go on, be-

(Testimony of Frederic W. Anderson.)

cause, of course, we don't see the fruit or the flowers, but we do eliminate a great many.

Q. I don't want to go into that as yet. Then when you went into the actual agricultural business for yourself in Merced, what year was that?

A. 1932. Well, actually I bought the place in 1930, but I didn't actually move to Merced and spend all my time on it until 1932.

Q. Now, will you just give us your activities down to date in connection primarily with plant breeding and primarily in connection with nectarine varieties and the breeding of the various nectarine varieties?

A. Well, I should have mentioned in that connection that in 1924, I spent the summer at the New York station, and I was particularly—I went to the New York station because Dr. Hedrick was the outstanding authority on fruit at that time and they had perhaps the best collection of varieties in the country and I went particularly for the [22] study of fruit varieties; spent a little time both in New Jersey and in Vineland, Ontario, about a week in each place because they were doing the outstanding jobs of peach breeding at that time. And so I was greatly interested in nectarine breeding had urged them to also engage in nectarine breeding, which they did, they have since introduced varieties. But as soon as I went farming for myself, I was particularly interested in nectarines and immediately went forward with the breeding of nectarines, although the bulk of my

(Testimony of Frederic W. Anderson.)

time at that time had to be spent on orchards, because I had to make a living.

Q. Then as the years went on, you spent, I assume, more time in nectarine breeding?

A. Yes; at first it was just an avocation, my spare time I would spend at it. I didn't have too much time, I had to work, but as I acquired more land and more orchard, and had more money, I spent my surplus money on fruit breeding.

Q. And how large a ranch did you finally acquire, devoted to——

A. Well, my original purchase was 60 acres, but I now have slightly over 300 acres in orchard and the plant breeding operation.

Q. And in connection with your plant breeding work, how extensive was the employment of other people to assist you?

A. Well, in the beginning I had very little help except [23] during the blooming season; I would have the bulk of my crew, at least as many as I could spare from other work, do the emasculating and I myself would do the pollinizing of the blossoms. Gradually, as I had more time for that, I had more people do it, and now I have, well, six people that devote practically all their time to plant breeding, and, of course, in the blooming season we have, oh, 20 to 40 working at it.

Q. Now, what has been the extent of your experience in plant breeding as to nectarines?

A. Well, of course, nectarines was the primary job, and during the first period I confined it almost

(Testimony of Frederic W. Anderson.)

entirely to nectarines. Gradually I spread out to other things, but the bulk of my work is still with nectarines.

Q. And in that connection, will you state how many new varieties of nectarines you were successful in propagating?

A. Well, I have had patented 31—31 patents have been issued to me.

Q. And what percentage is that of nectarine patents that have been issued under the plant patent law?

A. Well, I don't know exactly but I don't think more than ten have been issued to all others combined. Of course, some have not been patented that have been introduced.

Q. The result of yours amount to approximately 75 per cent, or a little better. Now, what percentage of your patented [24] or the varieties that you have propagated and patented do they bear to the total amount of nectarines packed as of this time?

A. Well, of course, we didn't have exact figures until this past season, and then they began only on July 3rd, but from July 3rd to the end of the season I compiled the figures from the reports of the Nectarine Administrative Committee, and that showed that 87.8 per cent of those that were packed were varieties of my origination and patented by me.

Mr. Savage: I submit, your Honor, he has qualified as an expert. Do you desire to ask any questions?

(Testimony of Frederic W. Anderson.)

The Court: It is not my custom to pass in the middle on qualifications, because I do not allow the other side to examine, unless the question is raised.

Mr. Savage: All right.

The Court: I think you will find our method of conducting trials is entirely different from that obtaining in the Superior Court, although when I was a judge in the Superior Court, and I had the honor of being one for eight years, I conducted them in the same manner.

Mr. Savage: I only thought that I had——

The Court: Use your own judgment, and don't raise the point unless the other side raises it.

Mr. Savage: Thank you, sir.

The Court: If I desire additional qualifications I will ask. [25] You must bear in mind the Court may disregard entirely the opinion of experts.

Mr. Savage: I appreciate that.

The Court: And if you want to see my views on experts you have to go back to 1940, to an article which appeared in the American Bar Journal, and also in the Patent Quarterly where I wrote on using experts in patent cases, and every lawyer from New York here who has ever tried a case before me has familiarized himself with my views towards experts. I respect them when they give honest opinions. I don't let them tell me whether a thing is valid or whether it is infringed. When they become advocates I entirely disregard

(Testimony of Frederic W. Anderson.)

their testimony, no matter how competent they may be.

Mr. Savage: Thank you.

Q. Mr. Anderson, one of your nectarine patents which you secured out of those that you have mentioned was patent 974, was it not?

A. Yes; that is correct.

Q. I show you now the original of that patent. Is that the original patent as granted to you?

A. That is correct.

Mr. Savage: Counsel, it was attached to the copy of the complaint, a copy was. May this be marked as Plaintiff's exhibit?

The Court: Is that a copy? [26]

Mr. Savage: It is the original, your Honor. I would like to have the order that when the trial has been completed the original may be withdrawn.

The Court: You know, in these cases we don't do that. Is that a paper copy of it?

Mr. Savage: Yes; I have one. A copy is attached to the complaint.

The Court: Is that a loose copy?

Mr. Savage: Yes.

The Court: All right, I will receive it instead of the original, because you want that.

Mr. Savage: Any objection?

Mr. Griswold: Is that a certified copy?

The Court: The certified copy is here. I am asking him to produce a paper copy. The certified copy may remain here, but it will not be marked as an exhibit. In all these cases we don't take the original, and even in cases when there are many

(Testimony of Frederic W. Anderson.)

patents of which notice is given, it is agreed paper copies may be used.

Mr. Savage: Thank you.

The Court: Mark the paper copy as original, and keep the certified copy here and return it at the end of the case.

(The document referred to was marked as Plaintiff's Exhibit 1, and was received in evidence.)

Q. (By Mr. Savage): Mr. Anderson, in your work of propagating species, [27] do you engage in nursery raising and selling of your species of your nectarines?

A. No; we sell no nursery stock. Of course, we have to grow the varieties from seed, so we are constantly growing large numbers of seedling trees, but we do not sell any at all. We just sell varieties as such.

Mr. Savage: Now, I hand you herewith a document—gentlemen, have you seen this? (Handing to counsel.)

Q. Mr. Anderson, I will ask you preliminarily, in your plant patent, Plaintiff's Exhibit No. 1, I notice that there is no designation of the variety by name. Will you explain the Patent Office procedure in that regard, if you know?

A. Well, the Patent Office will not permit the submission of a name with the patent. They require a description but only by number and will not permit a name of any kind to be considered.

(Testimony of Frederic W. Anderson.)

Q. Did you give a name to the special variety of nectarine as set forth under that patent number?

A. Well, I suggested the name to the assignee, to the buyer of the patent.

Q. What was that name?

A. Sun Grand.

Q. Is that the name under which it has been used and sold, to your knowledge?

A. Yes; I think that is correct. [28]

The Court: Of course, you can't patent a name.

Mr. Savage: That is right.

The Court: If the patent is identified by name it becomes merely a matter of nomenclature, and unless you have registered a trade name either under state or federal law, it becomes immaterial in the trial of a lawsuit, because you are not infringing a name; you are infringing a plant or an operation, no matter what you call it.

Mr. Savage: I appreciate that, your Honor, but in view of the fact that all of us will prefer, instead of talking about a patent, to talk about Sun Grand.

Q. Sun Grand is the only name you have claimed to be covered by this patent?

A. That is correct.

The Court: All right.

Mr. Savage: Hereafter, when we speak of Sun Grand, we are speaking of the nectarine that was patented by this patent.

Q. One other thing, you say "we," you don't have any partners, you are an individual operator?

A. Yes, I am; no partners.

(Testimony of Frederic W. Anderson.)

Mr. Savage: We would like to offer in evidence this document dated August 18, 1948, which I have shown to counsel.

The Court: It may be received.

(The document referred to was marked as Plaintiff's Exhibit 2, and was received in evidence.) [29]

Q. (By Mr. Savage): That is your signature, and the signature of the Kim Nursery?

A. Yes.

Mr. Savage: And the companion document. I call the Court's attention to that assignment, there are two varieties mentioned in the one document, but there is no significance to the other variety. It will not be referred to. Sun Grand is the only one.

The Court: Just a minute. Gentlemen, I notice you are taking this from a deposition, and if any part of the deposition is later to be offered by anybody, I think in offering these you ought to identify this, because otherwise you are taking things from a deposition, which may create confusion.

Mr. Shepard: Your Honor, the deposition has photostats of that in it.

The Court: I see. All right.

Mr. Savage: That is identified, your Honor, but not left with the deposition.

The Court: I see. All right.

Q. (By Mr. Savage): This is your signature here, the formal assignment of the patent?

(Testimony of Frederic W. Anderson.)

A. Yes.

Mr. Savage: We offer this in evidence as [30]
Plaintiff's Exhibit No. 3.

The Court: It may be received.

(The document referred to was marked as
Plaintiff's Exhibit No. 3, and was received in
evidence.)

Mr. Savage: If the Court please, I think this
is the first contested case in connection with plant
propagation that we know, and one of the major
methods of making separate and distinct diagnosis
of the different varieties involved and propagation
and so forth, so I want to go into the method used,
and I will try to do so very briefly, in propagating
and the different qualities of those things, with this
expert witness.

Q. Mr. Anderson, will you please give to the
Court the method used in propagating the nec-
tarine? A. In originating new varieties?

Q. Yes.

A. Well, we start at blooming time, and, of
course, it depends on what we are wanting to get.
Perhaps I could do it better by explaining just how
a given variety was produced.

Q. Proceed to do that.

A. Well, in this case I would take the LeGrand
nectarine, and it covers the field pretty well, be-
cause I wanted to get—because to start with, I
was dissatisfied with all the old varieties of nec-
tarines we had; in fact, only four were commer-

(Testimony of Frederic W. Anderson.)

cially sold in California of all white flesh, and [31] all were relatively soft and did not carry well to the large markets of this country, although they were shipped in some quantities. So what I wanted to get was a larger, firm fleshed nectarine, and I thought that yellow flesh would be better than the white fleshed ones we had, because yellow fleshed peaches had been preferred by consumers to white fleshed ones. So with that in mind, I selected the largest commercial peach that I knew, the J. H. Hale, and also used the largest nectarine I knew, which was the Quetta. Now, the Quetta was white fleshed, and I wanted yellow, but the J. H. Hale is yellow fleshed peach. Now, I emasculated, that is, I took the petals and the stamens off the J. H. Hale peach flowers, we use the whole thing so we don't have too much chance of mixing, because all the flowers are pruned rather heavily so we wouldn't need to emasculate so many flowers and the percentage is better when the larger number of the flowers have been removed. Then we take the petals and the stamens off, the stamens are the male bearing, pollen bearing organs on the plant. In the case of the J. H. Hale that was not wholly necessary because the J. H. Hale is self sterile, or practically so, one of the few peaches that is. But, in any event, that is the way we did it, and that, of course, is the tedious part of it, is getting these blossoms off. And at the same time we gathered—no, I should say that we take these off just before the blossoms open, before [32] they open up so

(Testimony of Frederic W. Anderson.)

that bees have not visited them and have caused natural pollination; that is done to avoid natural pollination. At the same time we went to the other tree, in this tree the Quetta nectarine and got the pollen, we just rub off the antlers of those stamens, the antlers of the pollen-producing organs of flowers, and we put them in a thin layer on a plate overnight at room temperature and they will discharge, they will open and discharge their pollen during that time. The next morning we put them in a small vial or bottle, and then take them to the J. H. Hale tree and put the pollen on the pistil, and if conditions are right this pollen then germinates and the tube grows down through the style of the pistil of the J. H. Hale and unites with the ovum in the ovary of the J. H. Hale, and constitutes the act of fertilization, and we have that little ovary that then develops into the peach fruit. We let that ripen on all those peaches on that tree, they do the same thing with each flower; all those peaches that ripen on that tree, we take the seeds when they are ripe and keep them until the following winter and then plant them. Then, of course, we let them grow for whatever time it takes, usually three years before they bloom and bear fruit.

In this case, all those were peaches, although the pollen was nectarine pollen, the pistil apparently was J. H. Hale, and in this case pubescent fuzz on the peaches dominant over [33] the lack of pubescent fuzz on the nectarine, and all the progeny

(Testimony of Frederic W. Anderson.)

are peaches, then, without further crossing in this case, sometimes we back cross to either peach or nectarine, depending on which we want, but in this case, without back crossing, we planted the pits, several hundred of them—in fact, I think several thousand, some of them, of course, don't grow, and then allow them to come into bearing, and then when they come into bearing the Quetta pollen asserts itself, and it is of a recessive character, the nectarine character, and one-quarter, approximately, of all the progeny will bear nectarines, three-quarters will bear peaches. We were only interested in nectarines, so we threw away, destroyed the peach part of it and just kept the nectarine. In addition, white flesh is dominant over yellow flesh, so that also segregates out in Mendelian fashion, and three-quarters of those were white flesh and one-quarter yellow flesh. Now, I wasn't greatly interested in the white fleshed peaches—white fleshed nectarine, and unless they were unusually outstanding would destroy them and not carry them further. The yellow fleshed ones, the yellow fleshed nectarines we paid much more attention to, and usually, in this case, we did, we top worked several of them onto mature trees to try to determine which was the best of the group, and one of these was the LeGrand nectarine—was the variety that was later named LeGrand. [34]

Q. You used that same process in developing the Sun Grand nectarine?

A. Yes. There are some modifications in the

(Testimony of Frederic W. Anderson.)

Sun Grand procedure. It is essentially the same; the principles are the same, but there are some differences in results.

The Court: I think, gentlemen, we have gotten a good start, and this is a good stopping point, and we will stop with the witness at the present time. You may step down, Mr. Anderson.

I want to call attention to the section I had in mind, I didn't have the Code in front of me. I don't try to remember sections in the 50 Codes that we have, but the section I have in mind is 281, the one that requires notice—282 of Title 35, which relates to defenses. It says, "The following shall be defenses in any action involving the validity or infringement of a patent and shall be pleaded: (1) Noninfringement, absence of liability for infringement or unenforceability, (2) Invalidity of the patent or any claim in suit on any ground specified in part II of this title as a condition for patentability, (3) Invalidity of the patent or any claim in suit for failure to comply with any requirement of sections 112 or 251 of this title."

The defendants in this case have pleaded noninfringement through their denial. Then this paragraph:

"In actions involving the validity or infringement [35] of a patent the party asserting invalidity or noninfringement shall give notice in the pleadings or otherwise in writing to the adverse party at least thirty days before the trial, of the country, number, date,

(Testimony of Frederic W. Anderson.)

and name of the patentee of any patent, the title, date, and page numbers of any publication to be relied upon as anticipation of the patent in suit, or, except in actions in the United States Court of Claims, as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit. In the absence of such notice proof of the said matters may not be made at the trial except on such terms as the court requires.”

So that even there, where you plead invalidity and give notice, you have to give notice within thirty days, the court is permitted upon proper showing to relieve a person of failure to do so. But when you rely on noninfringement, on facts, you don't have to give any notice, except by just denying infringement. I merely point to the fact that this provision in the order is merely a voluntary agreement on the part of the parties, and if it stands in the way of proper presentation the Court may grant proper relief.

All right, 2:00 o'clock.

(Thereupon, at 12:05 recess taken until 2:00 p.m.) [36]

Afternoon Session—2:00 P.M.

The Court: All right, gentlemen, proceed.

FREDERIC W. ANDERSON

a witness for the plaintiff, resumed the stand and further testified as follows:

Mr. Savage: Will you read the last question, Miss Reporter, please?

(Record read.)

Direct Examination

(Continued)

By Mr. Savage:

Q. Will you explain those differences, if they are material to this case, in connection with identifying the Sun Grand and the Red King?

A. Well, so far as I know, there is no difference between Sun Grand and Red King. I have never seen any.

Q. All right. Then will you please give the method of identification of the Sun Grand, the descriptive method and why it is a special variety to itself. I am not now talking about the patent. I am talking about the specific things that are within your knowledge that identify the Sun Grand and differentiate it from the other nectarines.

A. Well, that is rather a tall order, because I would have to identify it as separate from every other nectarine in existence. [37]

Q. Go ahead, as far as you can.

A. I don't know just where to start.

(Testimony of Frederic W. Anderson.)

The Court: I think counsel has given you a broader—let me have the patent.

Mr. Savage: I will be very happy to withdraw the question.

The Court: Let's limit it to the patent, because you cannot claim more than the patent allows you.

Mr. Savage: I will withdraw the question.

The Court: All right.

Q. (By Mr. Savage): Will you please give the identification factors as expressed in your patent of the Sun Grand, emphasizing those factors which differentiate it from other varieties?

A. I have the Sun Grand, a copy of the Sun Grand patent here, and if I can follow that I probably can come a little closer to it.

Q. Thank you.

A. Well, of course, to start with, a variety bearing yellow flesh nectarine fruit has to be novel and have commercially desirable characteristics. I take it you aren't interested in those commercial characteristics, but want the points to identify it from the——

The Court: You are looking at your specifications?

The Witness: Yes.

The Court: The specifications cannot enlarge your grant. [38]

The Witness: Oh, yes; I see.

The Court: All that you were given is what you claimed here?

The Witness: Yes.

(Testimony of Frederic W. Anderson.)

The Court: Any description in there which is broader than the claim may be entirely disregarded. This is what you claim, right there, beinning “a new and distinct variety.”

The Witness: I understand.

The Court: And these may be resorted to merely as descriptive of what you claim. If the description is broader than your claim, the claim prevails. All right.

The Witness: Well, the claim reads, “A new and distinct variety of nectarine tree substantially as described and illustrated bearing yellow fleshed freestone fruit characterized by a ripening period between the white fleshed John Rivers and Grower varieties”—that was originally a typographical error in the Government Printing Office and it read “Grower” but is corrected to the proper spelling of “Grower”—“approximately two weeks earlier than the yellow fleshed Kim or Bim varieties; and approximately three weeks earlier than the yellow fleshed LeGrand variety; its firm flesh; its relatively larger size; and its superior shipping and eating qualities.”

Now, to start with the new and distinct variety as [39] described, it would be a tree that was originated in the manner described, and has the characteristics—the characteristics are given covering the points that are used in identifying one variety from another, and we first take those characteristics that there can be no reasonable grounds for dispute, that anyone would recognize.

(Testimony of Frederic W. Anderson.)

Those are called qualitative differences, and then we go to quantitative differences, which are, oh, size and shape and color and ripening period, and time of leaf fall, time of opening, and that sort of thing. Now, those things that there can be rarely any dispute, there may be a few borderline cases, but we will say can rarely be questioned start with the large division first between peaches and nectarines, and the division that is used by practically all classifiers is whether they have fuzz or don't have fuzz. If they have fuzz, pubescence is the technical term, if they have fuzz they are peaches. If they don't have fuzz they are nectarines. There are borderline cases there, too, but none that enter commercially.

Then the next thing a person looks at when he sees a nectarine—we have eliminated all the peaches—looking at a nectarine, is the color of the flesh. Now, there are three types of color of nectarine flesh, white, yellow and red. So this particular Sun Grand is yellow fleshed. Therefore, immediately you eliminate the white and the red [40] fleshed varieties, and when this variety was patented the only three yellow fleshed nectarines grown commercially were the three that I give there, LeGrand, Kim and Bim, they were all my originations. Prior to the time that I bred nectarines, the only commercial varieties grown in this state were white fleshed. We have already eliminated them just on that color of flesh difference.

Then to further identify a nectarine we take an-

(Testimony of Frederic W. Anderson.)

other thing, the leaves, which are very fundamental and very important. There are three types of leaves in nectarines, one has reniform glands. The glands are a little organ at the base on the petiole and on the blade of a leaf, little projections there that secrete substances that are of certain value, and the first type is the reniform gland type. Now, that gland is a kidney shaped gland, and when a tree has reniform glands you examine it and there may be a few difficult to see, some may not have any glands, but you can always be sure they are not the other type that has no glands, because of the secretion, and the second type known as eglandular, have a different edge, and the third type is the intermediate type, known as globose glands. Now, this is the one that is heterogenous, that is it carries passage for both acids and reniform glands. If you cross a reniform gland type by a variety that has no glands, all the progeny have globose glands, and this was exactly what was the [41] situation with the Sun Grand nectarine, as set forth in the patent. I crossed the July Alberta peach—well, I crossed the Kim nectarine which has no gland by the Kim July Alberta peach, which is a peach with reniform glands. All the progeny again, with the same process I described, all progeny are peaches, so that first generation were all peaches, but with this distinction, they were all yellow fleshed peaches. You may recall that in the other case they segregated out into three-quarters white and one-quarter yellow, but

(Testimony of Frederic W. Anderson.)

there was no factor for white, so in this case they were all yellow fleshed peaches, and then when I planted the pits of these yellow fleshed peaches, the progeny were all yellow fleshed. They segregated, the same in the other case, into the three peaches and one nectarine, three-quarters peaches and one-quarter nectarines, but in those cases all the peaches were yellow fleshed, all the nectarines were yellow fleshed, and also had the segregation there in the glands. Instead of all being reniform, where there was no factor for eglandular and no factor for globose in the lands but all reniform, in this case you have the segregation again, one-quarter of the progeny of this yellow fleshed—these yellow fleshed globose peaches had no glands at all, roughly one-quarter had reniform glands and one-half had globose glands. Now, in this second generation progeny, we had rather large numbers—again we were not [42] interested particularly in the peaches unless they were very outstanding and in this case they were—we eliminated the peaches entirely, and we eliminated the absence of glands entirely. Absence of glands is a serious disadvantage in either type of fruit in that they are more susceptible to mildew and other diseases. So that left us with the reniform and globose peaches, and one-quarter of them were reniform and half of them were globose and a quarter were eglandular, which we eliminated, but of these other three-quarters this Sun Grand was the outstanding variety, and we selected it at that point.

(Testimony of Frederic W. Anderson.)

Now, that covers the leaf situation. Flesh, leaf. The next thing perhaps we would come to would be——

Q. Just a moment. The Sun Grand had what kind of glands? A. Had globose glands.

Q. Go ahead.

A. And, of course—well, I think that covers that. Had globose glands, that is a round raised gland at the base of the leaf, at the base of the blade.

Q. That is shown in the original patent?

A. Yes.

Q. One, two and three?

A. Yes; the glands are shown in the drawing and also described in the variety described. [43]

Q. Proceed.

A. We have got pubescence, white and yellow flesh, leaf type. The next thing is flower type. Now, flower type segregates out in the same way. This was a cross between Kim nectarine and Kim July Alberta peach.

Q. What are the flower types?

A. I am just trying to put that in my mind now. The Kim nectarine has a large flower, the Kim July Alberta peach has a medium type flower, it apparently is a cross between large and small. They are usually classified medium as small. But in growing the progeny of the Kim July Alberta peach you will get large blossoms, medium blossoms and small blossoms; actually now the medium and small overlap, and is usually three small and

(Testimony of Frederic W. Anderson.)

one large, because it is difficult to discriminate between the two types there except by growing seedlings. But in this case, they varied in that first generation between the large and medium, and then growing those you get again large and medium size blossoms, but the ones we selected had the large blossoms. Now, you can always—there is no difficulty, no two ordinary individuals would disagree at all when you just use two divisions there, large and small, although actually and really there are in the small the two classes, the small and the medium, although they overlap so much that an ordinary individual can't tell, in fact an expert can't [44] tell except by growing progeny and then he can tell, because the small will give only small ones, the medium give all three types. But you have that thing, that two people can't disagree on the flowers, one being a large type and the other a small type. At least to that point there is no disagreement. So that is four things.

The next thing there can be at least—seldom there can be disagreement, and that is clingstone and freestone. That is obvious, I think, when the flesh clings to the stone it is a clingstone and when the flesh is free from the stone at ripening time, it is a freestone. Now, there are borderline cases there that could at times cause dispute, but I think there can be no question about the Sun Grand. I have never seen one at full ripening period that was not entirely freestone.

A sixth point is the red color at the pit, or the

(Testimony of Frederic W. Anderson.)

absence of color. Now, as it happens, on my own varieties that I have had patented nearly all of them have red at the pit. I think there is only one exception that I think of offhand, the Gold Nugget has no color at the pit. With peaches, which operate the same way in this connection, there are a great many without color at the pit because the canners dislike color at the pit, and as a result nearly all of our cling peaches lack color at the pit. Some of them will have some color, but most of them have little or none. [45] Now, that is six.

Those are the ones that are used largely, and I think—no; there is one other I use here. There are two types of flowers, in addition to large and small size; one has stamens that are red—stamens with antlers on the ends that are red and are invariably self-sterile. The other type, like the J. H. Hale peach, that has yellow antlers and when they first open the pollen is non-existent or fails to germinate, and you can tell those apart just as the flowers open and before the antlers have dehisce, just on color alone. It is a little more difficult, there might be argument about it unless people are—that know what flowers are about, because after they open then the red ones they also look yellow, but you can tell, and we do in our own work, before we ever see the fruit, as soon as we find a variety, and we just send ordinary workingmen, don't know who it was, and they cut out the ones that are self-sterile and we don't need to bring them to bearing, to develop that variety further.

(Testimony of Frederic W. Anderson.)

Now there is one more point, that is qualitative.

Q. Is there anything about the patent of the Red Grand that has to do with the kernel?

A. Of Red Grand?

Q. No; I mean the Sun Grand.

A. The Sun Grand, yes. This is another one that has [46] not been used by classifiers, so far as I know, but we do in our own work, and it is a qualitative difference. They have never been used because, I think, it hasn't been generally recognized that there are certain peaches and nectarines with sweet kernels, and four of the 31 that I have patented do have sweet kernels, so we always break open the pit and take the kernels and see whether they are bitter.

Q. What was the nature of the Sun Grand?

A. The Sun Grand has a bitter kernel.

Q. Now, as to these qualifications, does like beget like in propagation? Do they stay constant?

A. I don't think I quite follow the question.

Q. You have given differences in creation. Now, when you come to asexual propagation, let us say, do those same peaches that you have described, the Sun Grand, do they stay constant——

A. Oh, you mean bud and graft?

Q. Yes.

A. Oh, yes. The whole fruit industry is built on the premise that they do stay constant, the whole nursery industry is built on that. When you bud an Alberta peach, or graft an Alberta peach, and that grows you know that it is going to be all

(Testimony of Frederic W. Anderson.)

Alberta peaches. The whole 500,000 clingstone peaches that are grown, when they belong to [47] those varieties they are all clingstone, there are no freestone. If they have reniform glands, they maintain reniform glands. It is just an extension of the original variety. It is really the same plant, except grown in a different environment.

Q. And the Sun Grand has what kind of a pit?

A. The Sun Grand has a freestone.

Q. And those pit types don't vary by asexual propagation?

A. By asexual propagation it is the same freestone; of course, the pits vary in size and color and that sort of thing, shape.

Q. But not in bitter and sweet?

A. No; they do not.

Q. What other distinguishing qualities, again limiting it to your patent, of identification are there to your Sun Grand nectarine?

A. Well, of course, where they ask for size, for instance, size of fruit, and we give a size, that doesn't mean that every fruit is that size, the same as all fruit on a given tree, there will be fruit that is large, fruit that is medium and fruit that is small, and we give a size, we give an average size for fruit, and, of course, that—there are so many of these qualitative differences, when you give size of leaves or fruit, or tree, or any other organ of the plant, they are extremely variable, and we [48] just give average size. That same thing applies to shape and to form, and to most of these other

(Testimony of Frederic W. Anderson.)

things. I have given the qualitative differences. These are known as quantitative differences, and although they are of some importance, any two people can argue about them at great length; some claim that an Alberta is bigger than a J. H. Hale, and another, vice versa, but we only can go on averages and that is, of course, all we claim.

Q. Now, what about the ripening time of this Sun Grand nectarine?

A. Well, Sun Grand—the ripening time again is one of those variables. It varies greatly from season to season, and the way we usually handle that ripening time is to give ripening time in relation to other well-known varieties. The usual way in this country is to use Albertas as the standard, and then say so many days before or after Albertas. We have no such standard in nectarines, and I think I use LeGrand—I used LeGrand and Kim and Bim, and told the relative ripening period with those three because they were the only three that were—the only three yellow flesh varieties that were grown commercially.

Q. When you set that out, what is the ripening time of the Sun Grand?

A. Well, as I said, that varies a little from year to year, too, but roughly, I said—I don't see it—oh, [49] yes, it is in the claim itself, approximately two weeks earlier than the yellow fleshed Kim and Bim—the Kim and Bim ripen essentially together—approximately two weeks earlier than the yellow fleshed Kim and Bim, and approximately three

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weeks earlier than the yellow fleshed LeGrand. We have to use that word "approximately" because it is difficult to determine just exactly when any fruit is ripe. We think—I think in this—in most of the patents, at least, have it when they are eating ripe. No, this is color ripe, is the way I described it here, and then you would have to compare it with the same stage of ripening with the variety you compare them with. LeGrand, of course, is a cling, and it is a little difficult to know just when to set the same period of ripening. I said three weeks earlier than the LeGrand, and approximately two weeks earlier than the Kim or Bim. Kim and Bim are approximately the same.

Q. What date of the calendar months?

A. You can hardly judge, although we did that particular year, I listed this as ripening on July 5th, hard ripe on July 5th, yet that varies from orchard to orchard and varies from season to season. I can remember picking Albertas one year many years ago on June 28th. I admit we picked them very green in those days, but I have picked them—started to pick them, I mean, as late as August 5th, so you see you are getting into a very variable thing that [50] you can't be definite on, it isn't like the characteristics I went into first.

Q. I don't think I want to go into the other secondary means of identification that are not as reliable as those you said were qualitative, but they are all specified in the patent, the items there with reference to flavor and firmness and fibers and

(Testimony of Frederic W. Anderson.)

aroma and eating qualities, and so forth. They are correctly described in the patent, are they?

A. Yes; that is correct.

Q. By the way, I didn't ask you this: On Plaintiff's Exhibit No. 3, there is a specification of you being paid \$500 a year for the transfer of that patent by Kim Brothers? Do you have any other financial interest or do you have any financial interest in the outcome of this case, where you would get a money reward?

A. No. Regardless of the outcome of the case I get exactly \$500 a year for the rest of the life of the patent.

Q. All right. Now, have you seen the controversial type of nectarine, which we will call Red Grand?

The Court: He hasn't called it. We have a better term than that, the accused. We call it the accused device in patent, and we call it the accused plant.

Q. (By Mr. Savage): Have you ever observed the accused variety of nectarine, which is the subject of this suit, as being a [51] patent infringement?

A. Yes.

Q. Where did you see that variety?

A. Well, I saw it on Mr. Hagler's ranch both in 1957 and 1958.

Q. And will you state approximately what time? Take the first trip in 1957?

A. I wouldn't remember the date, but I do know

(Testimony of Frederic W. Anderson.)

that they were harvesting the LeGrands, which probably was in late July.

Q. And did anyone go with you?

Mr. Shepard: What year?

Q. (By Mr. Savage): 1957 I am referring to.

A. Yes.

Q. Did anyone go with you?

A. Yes; there was quite a large group.

Q. Who were they?

A. Well, if I remember correctly, there was Mr. Kim and Mr. Stafford, his nursery manager; Mr. Butler, his orchard superintendent, and I took with me two of my plant breeder associates, Mr. Taylor and Mr. Zaiger, and there was a fruit packer, Mr. Casabian, I think his name was.

Q. And what was the occasion of your going down there, Mr. Anderson? [52]

A. Well, I had seen an auction report from the east. I was watching the auction reports closely because I was interested in the Sun Grand and Early LeGrands, my varieties which ripen at the same time, and at the same time a Red King began to appear. There were certain other varieties, too, but the other varieties were all varieties that I knew or varieties that were bringing very much lower prices and caused no suspicion, but as soon as I saw a variety that was selling somewhere in the same price range, somewhat lower but not greatly lower, I wondered if it was just a new name for something. We had had infringements before, and I decided that we had better investi-

(Testimony of Frederic W. Anderson.)

gate and see what this Red King is, so as a result of that we went down to the Hagler place and examined it. He had trouble with other infringements, so——

Q. Now, where did you go on the Hagler place? First of all, I will ask you, did you see Mr. Hagler?

A. We didn't see Mr. Hagler on that trip, no.

Q. Where did you go with reference to the Hagler ranch?

A. Oh, it would be hard for me to explain. We went to the ranch, and Mr. Kim had previously located this block; in fact, there had been arguments about it for two or three years.

The Court: Let me give you a warning. You are too much of an advocate. You are not a lawyer. Just quit throwing in that you had had trouble with this or that, because that [53] is an argument, and I pay no attention to argument by laymen. We are very jealous of the lawyer's prerogative to argue a case, and I don't allow witnesses, no matter how educated and how much interested to argue. You are a very interested witness because it is your patent.

The Witness: Yes.

The Court: So any such things thrown in, you do it deliberately, you have done it ever since you have been on the stand. It is characteristic of the man who tries to defend his own invention. So please omit any such side remarks. Just state factually where you went and what you saw, please.

The Witness: I will try.

(Testimony of Frederic W. Anderson.)

The Court: Well, if you don't, I will stop you. If you don't stop, there are other means of stopping you, you see.

Q. (By Mr. Savage): All right. What did you see at the Hagler ranch? I am not talking about what any of the other people that were with you saw, but what did you see?

A. Well, where we stopped, I don't know just how to get at this.

The Court: Describe factually what you saw. You saw a tree, you saw fruit, you examined the fruit. You haven't forgotten your English, you were taught the narrative method. Describe objectively what you saw, not subjectively. What [54] did you see when you examined the tree?

The Witness: Well, the first stop we made, and got out, the tree to me——

The Court: I know what you are going to say, and it is not proper. Not how it looks to you at all, just describe them so that I can tell whether they are the same or not. Tell what size they were, what color, whether you took the fruit, opened it, looked inside, and what you saw. Don't tell me that they looked like yours, because that is my province and I don't allow even an outside expert to invade that province, you see. Don't tell whether they looked like yours or not, tell how they looked and I will determine whether they looked like yours. If you can't describe because you are interested, they can withdraw you and put on a disinterested person who can describe them.

(Testimony of Frederic W. Anderson.)

The Witness: Well, to describe the tree that I saw—maybe I can—

The Court: I will help you. You have given certain characteristics. You cannot give characteristics as to size, desirability, those are subjective.

The Witness: I understand that.

The Court: Describe it in the term of the six characteristics that you gave.

The Witness: Oh, I see. I can do that.

The Court: Compare them in that manner. [55]

The Witness: Yes; I think I can.

The Court: You talked about the yellow flesh, how the trees look, how the leaves look, as compared with your photograph here?

The Witness: Yes; I think I can do that.

The Court: That's right.

The Witness: Well, the orchard that we stopped at, the trees, we looked at the trees, and, of course, I looked at the—well, all parts that would give these qualitative differences, and among those, of course, you start with the fruit naturally, and the fruit was yellow fleshed; it was freestone, and on qualitative differences there would be those two qualitative differences on fruit. Then I examined the leaves and there are three types of leaves I described, and this had globose glands. Of course, obviously the first difference was it was a nectarine, it didn't have fuzz so it was a nectarine. That was four. Another qualitative difference, the color around the pit was red, was five; and, of course, there were no blossoms at that time so I couldn't

(Testimony of Frederic W. Anderson.)

tell what the blossoms were. I couldn't tell the color of the antlers. Now, there was an eighth one, let's see. I have forgotten what that eighth qualitative difference is.

Q. (By Mr. Savage): May I be pardoned for leading? What was the [56] condition of the pit?

A. Oh, the pit was a freestone. I think I mentioned that, however.

Q. As to the kernel?

A. Oh, the kernel was bitter. I forgot the kernel. I knew there was one. That were all the qualitative differences. In fact, those are the only qualitative differences I know of. Of course, the quantitative differences I don't think it would be necessary to go into, because they are so variable unless there are some that should be used.

Q. I will ask you about some of the quantitative ones. What about the shape? Was there fruit on the trees at that time?

A. Yes; the fruit had been harvested, but there was some left on the trees and it was a very firm fleshed nectarine, of good size, probably—these on the underside of the tree were not as large perhaps as the regular picking, I think they had been left because they were too small, but they grow—when they are very firm they grow for a considerable time, and they were still good firm nectarines, but I think smaller probably than the average ones that had been on the trees earlier. The flavor, they were good eating nectarines, and that sort of thing.

Q. May I ask you this, as to all of those qualita-

(Testimony of Frederic W. Anderson.)

tive conditions that you say and describe and differentiate the [57] Sun Grand nectarine as patented, were all those conditions met by the fruit on the tree that you saw?

A. Yes; that is correct.

Q. Now, how many trees did you see there? I think that is in the pleadings, they admit to 1,700 some odd trees. We don't need to go into it, of this variety. Did you see a substantial number of trees, Mr. Anderson?

The Court: We don't need to go into that, it merely shows the extent of infringement, if there is any.

Q. (By Mr. Savage): Mr. Anderson, did you go down to the Hagler place after 1957?

A. Yes; this season, this past season, July—I believe it was July 10, 1958.

Q. And did you go with anybody then?

A. Yes; I went with you, Mr. Savage, to Mr. Hagler's place, and then Mr. Hagler and Mr. Houk accompanied us around to show us the trees.

Q. Did you see the Hagler trees on that trip, the same ones you had seen on the previous year?

A. Yes, essentially the same trees, at least they were in the same block.

Q. And were the qualitative descriptions you have given—was there fruit on the trees?

A. Yes; they had kept one tree in one block that they [58] hadn't picked so that we could get the fruit from it. The fruit had been largely picked, they were going to make another picking on that

(Testimony of Frederic W. Anderson.)

particular block. On the next block it was a little bit difficult to find fruit, although Mr. Hagler said they would make another picking.

Q. Did you examine more than one block of trees on this trip?

A. The same two blocks.

Q. Now, did you take any samples the first trip you went down? A. No; I did not.

Q. Did you take any samples of the fruit on the second trip?

A. Yes; that was the purpose of the trip, to get samples.

Q. Where are those samples?

A. Well, they decayed. We hoped to have them at the time of the trial. We were able to keep them until the date scheduled then, September something, but they are gone now.

Q. Do you have any of the pits left?

A. Yes; we kept the pits.

Q. The flesh is deteriorated. At that time was there any conversation with Mr. Hagler with reference to the issue here of whether there was an infringement or not? A. No. [59]

Mr. Griswold: May I have that last question and answer?

(Record read.)

Mr. Griswold: All the attorneys were present.

The Court: It doesn't mean anything.

Mr. Savage: We didn't discuss it, that is all there is to it.

(Testimony of Frederic W. Anderson.)

The Court: All right.

Q. (By Mr. Savage): What did you do with some of the samples you took on the last trip, in '58? Did you give them to anybody? Or did you keep them yourself?

A. We went by Reedley, and stopped at the office there, and—Mr. Kim's office, Reedley Nursery office, and then we took them on home and stored them in the basement of Mr. Taylor's house, where we have a, oh, a cool storage for keeping our own fruit, and we kept them there.

Q. Mr. Taylor had access to them?

A. Yes; at all times.

Q. Were they kept in separate boxes, or in a separate box, so they could be identified?

A. Yes; we could identify them.

Q. And you and Mr. Taylor could both identify them? A. Yes.

Mr. Savage: You may cross-examine.

The Court: We will take a short recess, because I do not [60] like to break the continuity of cross-examination, I always take a recess.

However, there is one thing I forgot to do, gentlemen, and that is to ask you gentlemen to dismiss as to all the fictitious defendants. Apparently nobody has been served except Mr. Hagler and Mrs. Hagler.

Mr. Savage: We do now ask the Court to dismiss.

The Court: All right, the Court dismisses all

(Testimony of Frederic W. Anderson.)

fictitious defendants, Does I, II and III and Sally Soe—that's a new one.

Mr. Griswold: I would like to also call to the Court's attention the fact that Mrs. L. A. Hagler has passed away, so it leaves the sole defendant, L. A. Hagler.

The Court: Well, I think that should be called attention to, because if she has an interest in the property, then her executor should be made a party to the action.

Mr. Savage: We didn't know that, your Honor.

Mr. Griswold: If the Court please, the property is all community property, and under the Probate Code, Section whatever it is, the husband acquired it all.

Mr. Savage: May we ask one further question, counsel? Is Mr. Hagler the executor?

Mr. Griswold: There will be no estate because the California Probate Code section, I believe that is Section 40, provides where it is community [61] property——

The Court: Community property, it belongs—the words they use is, it belongs to the survivor; all he has to do is to file a certificate of death, and it automatically goes to him.

Mr. Savage: That has been done?

Mr. Griswold: Yes, it has been filed.

The Court: I think then it should be dismissed as to her, too. The only object in keeping her, while under the code the husband has the management of the community property and therefore if he is

(Testimony of Frederic W. Anderson.)

guilty of a tort, which the infringement is, the community property may be subjected to any levy or attachment. This is not an action in rem. There is no object in maintaining her. When you are pursuing separate property sometimes it is well to retain the wife, merely for the purpose of having execution, but this is merely an action in money damages, just as though he were charged with injuring a person, and making the wife a defendant wouldn't add anything to the case.

Incidentally, I had that question in a case involving misappropriation of money by an employee. Get me 121 Fed Supp. 345, so long as you brought that up.

Mr. Savage: If the Court please, upon direct representation of counsel for Mr. Hagler, and who were attorneys for Mrs. Hagler, that the estate has by proper proceeding been declared to be all the property of Mr. Hagler, we will [62] move, and join in the motion in dismissing as to Mrs. Hagler.

The Court: Before I pass on the motion I want to call your attention to a case which I cite in there, because that question arose. You may step down.

I want to call attention to this. While I made the suggestion, I don't want counsel to do anything that would jeopardize anybody's right. This particular case I am speaking of, the opinion is Goodrich vs. Naples, and that was a tort, brought by the Goodrich Company against an employee who received kickbacks, which of course some people consider legitimate practice but which the law frowns upon

(Testimony of Frederic W. Anderson.)

as being an act of fraud on the employer. The truth of the matter was this man was being paid by suppliers, who are always willing to pay a little graft in order to get an advantage, although they are not usually punished. And he received a kickback on every contract that he made with them for supplies for Goodrich, and he claimed that he did work in his spare time and so did the men who paid him the money. I found that they all lied and this was just paid as a kickback and gave judgment for some \$49,000. As the property had been transferred to the wife, in order to make the judgment good against her, I allowed the judgment to run against her only to that extent, but in discussing the matter I called attention to the fact that under the law of California she could not be held personally liable because [63] she did not participate in the fraud. And in that case I said "The judgment against Naples shall run jointly also against his wife. But this only to the extent that the plaintiff shall be able to pursue any community property which Julia Naples may have, including the sums derived from these transactions, wherever deposited * * * She should be retained in the case in order to enable the plaintiff to levy, without legal complications on any community property standing in Julia Naples' name. There is no evidence that she participated in her husband's tort." And then I said, "The husband, under his power to manage the community property, may bind it by acts which amount to fraud or deceit," citing

(Testimony of Frederic W. Anderson.)

California Civil Code, Sections 172 and 172a. "To this extent, the rule of agency applies, which holds the principal through notice to the agent." California Civil Code 2332. "But the cases in which the wife was held personally liable were torts involving real property or interests in such property, in which the fraudulent representations of the husband were held binding on the wife because she had participated in consummating the transactions or retained real property secured in exchange." Then on footnote 20 I cite a large group of cases, mostly in relation to property where the plaintiff had parted with property and the wife had participated in the act, or the property was put in her name.

The important thing I cite is *Grolemund vs. Caferata*, [64] as I pronounce it in the Italian way, 17 Cal. 2d 679. This involved the question whether community property could be subjected to satisfaction of judgment against the husband for his tort, and it is a very long opinion, written by Judge Curtis. I will skip the discussion and merely read the conclusion. I think the conclusion is contained on page 688:

"A complete reading of all our code sections on community property clearly demonstrates that our community system is based upon the principle that all debts which are not specifically made the obligation of the wife are grouped together as the obligations of the husband and the community property (with the single exception of the wife's earnings, which are exempted from certain types of debt, Civ.

(Testimony of Frederic W. Anderson.)

Code, Sec. 168). This proposition was confirmed in *Street vs. Bertolone*, 193 Cal. 751 * * * 'The term "the debts of the husband," unless otherwise qualified, includes debts incurred by the husband for the benefit of the community as well as his own separate debts.' Since in this state there is strictly no such thing as 'community debts' in the sense in which they exist in Washington, the decisions of the latter state lose force as a precedent here.'

In other words, they were citing some Washington cases where it was held the community property was not held liable on a tort of the husband. In this case they had a judgment [65] against the husband for personal injuries of an automobile collision, where the defendant in that case was adjudged to be liable. Then the action was brought to secure an injunction against the officers of the San Mateo County and the the sheriff of San Mateo County and the sheriff of the City and County of San Francisco, to enjoin them from levying on the community property. So the question before the court was clearly whether the community property can be subjected to the payment of a judgment for a tort committed by the husband, and the court held that it could, despite the fact that the wife was not made a party to the action in which the recovery was had.

So you see, under this case, you don't need the defendant's wife at all as a defendant, because should you get a judgment the community property levy could be directed against the community property because it would be a money judgment.

(Testimony of Frederic W. Anderson.)

Mr. Savage: We appreciate the clear manner in which the Court has explained it, so we join now with Mr. Hagler and his counsel in the motion for dismissal against Mrs. Hagler.

The Court: All right, the action will be dismissed against Mrs. Hagler, and against the fictitious defendants, and it will proceed solely against Mr. Hagler.

Now, we will take a short recess. [66]

(A short recess was taken.)

The Court: All right, Mr. Anderson, will you resume the stand?

Cross-Examination

By Mr. Griswold:

Q. Mr. Anderson, you state you visited the Hagler ranch in 1957 for the first time?

A. Pardon?

Q. Is it true you visited the Hagler ranch the first time in 1957?

Mr. Shepard: Your Honor, we object to the question as misstating the evidence. He said he went there in 1957, he did not say it was the first time.

The Court: All right, that is proper cross-examination. Go ahead.

Q. (By Mr. Griswold): You had been near Mr. Hagler's ranch at earlier dates, had you not?

A. Oh, yes, many times.

Mr. Shepard: One further objection, your

(Testimony of Frederic W. Anderson.)

Honor. We object to the question and move it be stricken as exceeding the scope of the direct examination.

The Court: The objection is overruled, because it is the rule of this Court, even in criminal cases, that a person cannot merely by limiting the scope of the examination skip [67] over dates and then prevent cross-examination.

Mr. Shepard: We don't want to prevent cross-examination. The purpose of my objection was in good faith, because I feel what the counsel is going into now is part of his case, and we didn't want to offer it as part of our case.

The Court: Well, that is all right. He has the right if he can bring out by proper cross-examination facts which are favorable to him to do so. I am just as strict as anyone. In fact, in a case we tried here three or four weeks ago, we had a malpractice case, and we had a United States Attorney who sought to unduly cross-examine the plaintiff, who claimed to have been injured by malpractice, over matters that were not proper and I stopped him and I told him that he could call back the witness under 43(b) later on, but that of course doesn't prevent proper cross-examination by the attorney dealing with the entire relationship between the defendant and the witness. Of course, anything that is brought out that is favorable can only be considered in determining the case on the merits, because so far as the plaintiff's case is concerned if you produce a prima facie case any admissions by this witness or

(Testimony of Frederic W. Anderson.)

by others that are favorable to the defendant could not be considered on any motion to dismiss that the defendant might make, if they should make one. But cross-examination may be indulged in going beyond a strict date line, where the [68] purpose is to show the relationship between the witness and the defendant. All right. Proceed.

Q. (By Mr. Griswold): You have been to the Hagler ranch many times, before 1957?

A. Several times I should say, yes.

Q. And had you ever gone there in the company of Mr. Kim before 1957? A. Yes.

Q. And am I correct that that was in 1954?

A. Yes, I recall one instance in 1954.

Q. Who did you go with, and what season of the year, if you remember?

A. It was when they were harvesting. In '54, the time I remember being there, they were harvesting LeGrands, which would have been probably late July.

Q. And who was with you?

A. Mr. Kim and Mr. Stafford.

Q. Which Mr. Kim?

A. Mr. Hyeng S. Kim.

Q. And Mr. Stafford's first name?

A. Howard Stafford, the nursery manager, I believe.

Q. Anyone else? A. I think not.

Q. And the purpose of that visit? [69]

A. It was an identification visit also, to try to identify a variety.

(Testimony of Frederic W. Anderson.)

Q. What variety?

A. Well, it seems—I am trying to avoid this thing.

Q. Just tell me what variety?

A. It was no variety named. It seemed that Mr. Hagler had brought a variety to Mr. Kim, that he wanted identified and Mr. Kim asked me to come down and see it on the tree. He brought one fruit over to Mr. Kim, I believe.

Q. And that was in 1954?

A. That was in 1954, yes.

Q. Were you present when Mr. Hagler brought it to Mr. Kim to be identified?

A. No, I was not.

Q. And where did you get your information of that visit by Mr. Hagler to Mr. Kim to identify this fruit?

A. Well, Mr. Kim always called me when there was a matter of identification on my varieties.

Q. And was this variety to be identified a nectarine? A. Yes.

Q. So you did then in 1954, some time during the LeGrand harvest, go to Mr. Hagler's ranch?

A. That is correct.

Q. What did you do there?

A. Well, we were looking for Mr. Hagler on that [70] particular occasion.

Q. Did you find him? A. No we did not.

Q. What did you do with regard to any inspection of trees or fruit on that occasion? Any trees or fruit?

(Testimony of Frederic W. Anderson.)

Mr. Shepard: Just a moment. I will object to it unless it is limited to the Hagler ranch.

The Court: I beg your pardon?

Mr. Shepard: I will object unless we are referring to the inspection of trees and fruit on the Hagler ranch.

The Court: That is what he is talking about, a visit to the ranch, the defendant's property. Go ahead.

A. Well, on the Hagler ranch we investigated some fruit.

Q. (By Mr. Griswold): Are you acquainted with the Hunter ranch?

A. We visited the Hunter ranch.

The Court: Is that operated by Mr. Hagler too?

Mr. Griswold: Yes, at this time I believe the testimony will be.

Mr. Shepard: Now, just a moment. I want the Court to understand when I object I don't do it for trivial effect. They have a certain strategy of their case I know they want to present. We leave that to them, but our case is along positive affirmative lines, and we don't feel this is part of the direct examination. Mr. Hunter so far has not been [71] shown so far to be a part of the case at all, there is no evidence at all about him.

The Court: Well, we are going to find out.

Mr. Shepard: I object on that ground anyhow.

The Court: The objection will be overruled.

Q. (By Mr. Griswold): Am I correct that Mr.

(Testimony of Frederic W. Anderson.)

Hunter's ranch is in close proximity to that of Mr. Hagler?

A. Yes, across the road, to the east, I believe.

Q. And on this occasion in 1954 tell us what you did, as far as inspecting any trees or fruit on the Hunter ranch?

A. Well, we inspected two trees, which I identified as Sun Grand.

Q. Can you locate those trees verbally in the orchard? I assume you were in an orchard?

A. Yes, we were in an orchard. It is a little difficult after this time to do that.

The Court: Well, if you do not remember any more definitely what you did, you may say so, and then counsel will have to proceed with the next question.

The Witness: I remember definitely, if I can give that—I think I remember definitely. We were looking for Mr. Hagler, we stopped the car to Mr. Hunter's house. First, they told us at the packing house that Mr. Hagler was picking at Mr. Hunter's place, and so we went over there [72] really looking for Mr. Hagler, but we went to Mr. Hunter's house first and Mr. Hunter wasn't there, and we walked out towards the LeGrand block where they were picking, and on the way we found two trees that—well, one of them I identified positively as Sun Grand, and the other had no fruit on it and I wasn't absolutely positive, but from the other characteristics I thought it was Sun Grand. Now, we had not found at that time either Mr. Hagler or Mr. Hunter,

(Testimony of Frederic W. Anderson.)

and so we proceeded out, going direct from the car, in other words, to where they were picking, and Mr. Hunter came from where they were picking and met us and that was the first time I had been on the place and——

Mr. Shepard: Now, just a moment. I want to caution my witness that is as far as the question goes. You described what trees you saw, and when you describe further trees you are getting on a different subject.

Q. (By Mr. Griswold): At that time you did identify two trees as being what you call Sun Grand, or plant patent 974?

A. I identified one tree positively, and the other I thought was, I wasn't certain because there was no fruit.

Q. Is it your testimony that without the fruit you are unable to make a positive identification?

A. To make an absolutely positive identification without fruit, I cannot do. [73]

Q. Do you know as a fact that all of the trees in the orchard, except one which is the root stock or the original Red King tree, are LeGrand nectarines? Do you know that for a fact?

A. No, I do not.

Q. I am not asking you to say that the tree, the parent tree, is Red King or otherwise. But did you know then or later that all the rest of the trees were LeGrand nectarines?

A. No, I don't know that. I don't know what is

(Testimony of Frederic W. Anderson.)

on the place. We only saw a very limited part of the place.

Q. How many fruit did you take off this parent tree? A. Well, we didn't—

Q. On this occasion in 1954?

The Court: If any? You are assuming he did.

Mr. Griswold: If any.

Mr. Shepard: Object to the use of the word "parent tree" as coming out of nowhere and being counsel's way of describing something that hasn't been brought up at all.

The Court: Pair of trees he identified. Two trees that he could identify, one positively and one he didn't.

Mr. Shepard: I don't think that is what he means, your Honor. Pardon me for saying so, that is why I object.

The Court: I assume that is what he means. P-a-i-r, isn't it?

Mr. Griswold: Parent, p-a-r-e-n-t, or the original tree. [74]

The Court: Parent, oh, I am sorry. Parent tree. Go ahead.

Q. (By Mr. Griswold): This tree in 1954 that you say you positively identified as a Sun Grand, or plant patent 974, did you observe any fruits on that tree?

A. On the one I positively identified, yes.

Q. How many?

A. There were only a few, growing on the un-

(Testimony of Frederic W. Anderson.)

derside, the shady part of the tree, that apparently had been left in harvesting.

Q. Did you pick them personally?

A. I think I picked at least one or two of them. There were only, I would say, half a dozen, something like that.

Q. Now, referring to exhibit—I believe the copy of the patent is Exhibit 3, is it?

Mr. Shepard: Exhibit 1.

Q. (By Mr. Griswold): Exhibit 1, will you direct your attention to your plant patent 974, and I direct you to figure 1, and ask you if that coloration that you observe there is representative of the plant patent 974?

A. Well, it is certainly representative. It is apparently one that was picked at the hard ripe stage that I described. This was sent to Mr. Addison E. Avery, whose [75] name is down in the corner, in Oak Park, Illinois, and was probably picked fairly firm, so at this stage of ripening I think that is a fair representation of the color. I don't recall just when I sent them, but I sent him leaves and fruit; and usually in most cases I just send two, but in some cases I send more. I don't remember in this case whether I sent more or not, and then he made the drawings and the coloration, of course.

Q. Now, am I correct that there are methods to determine colors according to certain classifications and standards?

A. Well, I know very little about it, but there are color classifications based on color standards.

(Testimony of Frederic W. Anderson.)

I think he says he used one of those books, I am not sure, Ridgeway Standards, but I don't see it here, but that is the one I think he normally uses.

Q. What I am getting at is, if we are speaking about a comparison of, we will say, yellow flesh, we want some standard to go by, and if we say round, or more round, we want to know what we are referring to. What is the comparison? Now, is there any standard for your coloration in plant patent 974?

A. Well, they use standards; there are various standard colors, and they follow one of those books. Oh, I said Ridgeway; I believe it is Maerz & Paul, I am not sure. [76] Doesn't it say somewhere here?

Q. Can you show me that in your plant patent 974?

The Court: There is no such indication as to what color is given.

The Witness: Then I wouldn't know, other than this man Avery usually uses a certain one, and I think it is Maerz & Paul. I said Ridgeway a minute ago, so I am not sure.

Q. (By Mr. Griswold): Mr. Anderson, we are talking about your patent plant 974. A. Yes.

Q. Am I not correct that the better practice of designation of coloration is by some reference to the charts that are in use by plant identifiers?

A. Yes, I think, and normally they put that down. I don't know why it wasn't here. I thought it was.

Q. I will ask you again, I don't believe you an-

(Testimony of Frederic W. Anderson.)

swered my question, is this photograph showing the side view and cross-section a true representation of the color of your plant patent No. 974?

A. Well, I don't know much about colors because they are so variable depending on——

The Court: Well, you—— [77]

A. It looks all right to me.

The Court: When an attempt is made to reproduce color photographically, if this were black as it appears on the photograph, you see, you couldn't tell what color they are, but you can tell the appearance, and you may testify on cross-examination whether in your opinion these approximate the natural color, assuming that natural color can be reproduced in all its nuances by photography.

The Witness: Actually these are paintings and not photographs.

The Court: Well, all right.

The Witness: Yes, I think that for that period of ripening that they are accurate reproductions.

The Court: All right.

Q. (By Mr. Griswold): Mr. Anderson, you gave us certain characteristics which set this apart from all other varieties.

A. What I did, I think, was to use the qualitative differences that differentiate between all varieties, and then gave this one, the characteristics of this one, of those qualitative differences.

Q. Let's take the first one. The fruit is yellow flesh. Does that distinguish this from all other varieties of nectarines?

(Testimony of Frederic W. Anderson.)

A. Oh, certainly not. [78]

Q. Are there other yellow flesh?

A. Certainly, all of my patents are yellow flesh except two, 29 of 31 are yellow flesh. It eliminates all the white and the red, that is all, all that have white flesh and all that had red flesh. It eliminates none with yellow flesh.

Q. So that that isn't a means by which a positive identification by itself can be made?

A. No, it is a matter of elimination. You eliminate all of certain types, and you just gradually eliminate. It is a system that is used by—in classification of peaches and nectarines all over the world by all who have tried to do them.

Q. All right. The second point was it was red around the pit. You mean after the pit had been removed, that is, leaving the cup in which the pit has rested?

A. That is right.

Q. You don't show the redness around the pit in your patent 974, but can you describe the redness, according to any scale of any standard method?

The Court: Well, I think there is a little line which would indicate that. The only way you can express it in a drawing is that unless you take the pit out and photograph it, or try to imitate it, try to imitate—I don't know whether you call that a hole. Call it a depression, in the language of patent work. [79]

Mr. Griswold: I see that.

The Court: But there is an indication to me, a little red line at the edge of the pit that would

(Testimony of Frederic W. Anderson.)

seem to indicate that behind it the depression is reddish.

The Witness: Could I amplify?

The Court: Yes. Go ahead.

The Witness: I think this does it very well at that stage of ripeness. Of course, as the fruit ripens that red extends. In some varieties, not in the Sun Grand, it will extend all the way out. But I think this, at that stage of ripening shows the red line, and as it becomes eating ripe it would be considerably more extensive, spread out.

The Court: The entire thing is covered by the pit in the photograph, isn't it?

The Witness: Yes, that is right, except the edge.

The Court: This is just the edge?

The Witness: That is right.

Q. (By Mr. Griswold): Are there other varieties that are red around the pit?

A. Oh, certainly, certainly.

Q. Nectarines? A. Certainly.

Q. How many?

A. Oh, most of mine. I said 29—no, 30 of my 31; of the ones I have introduced only one—— [80]

Q. Peaches are also red around the pit?

A. Oh, a great many. In this state, most of our shipping ones are red around the pit, and most of our canning ones have little red around the pit. Some of them do but the canners object.

Q. The well-known Alberta peach is, of course, red, that most of us are familiar with?

(Testimony of Frederic W. Anderson.)

A. Yes.

Q. All right. You indicated that the pit was a freestone, that was another characteristic. Now, standing by itself that isn't determinative, is it?

A. No, not at all, except that roughly—in fact most—I don't know whether most. I think most of my varieties are cling. It differentiates from mine and it just roughly cuts half of them out; in nectarine varieties roughly half are freestone and half are clings. That is a very rough approximation.

Q. Of the items I have mentioned that you have used, there are many other varieties that have these same characteristics?

A. Yes, that is true, but to get variety you have to multiply these things each time by the number they are, and you get a great many groups and that is done by a great many classifiers. In fact, I don't know—probably I can't go into that.

The Court: No, no, you are on cross-examination. You [81] are not limited. Go ahead.

The Witness: Well, then the latest classification I know by competent men is a French publication on the identification of peaches, is the title, but it includes nectarines, the main nectarines of Europe, 31 varieties. Now, he gets those in groups, 84 groups of peaches and 84 groups of nectarines, and then you can get all your nectarines in the different groups. Now, the ones he described there are only one that would fit in the Sun Grand, in the varieties that are grown commercially in California at that time there were none that would fit in that group.

(Testimony of Frederic W. Anderson.)

Now, I have introduced some others that would fit in that group, have all these qualitative differences, but the other commercial varieties grown in California there are none in that group; of those grown in Europe there was one. That one—I am afraid I am going too far. Am I, your Honor?

The Court: No, no.

The Witness: There is one in Europe that has been grown for over a hundred years that fits in that group, which happens to be group 113. It has all these things that you are mentioning.

Q. (By Mr. Griswold): You mean that plant 974 has?

A. Yes, 974 would come in the 113 group, and there was one described in this European publication by the Ministry of [82] Agriculture of France.

Q. What is the name of that?

A. I am just trying to think of it, the name of the variety. I have seen it, too, saw it in New York station in 1924. Well, at the moment, I don't recall the name. I can get it for you.

Q. All right. You indicated another test was that the kernel was bitter, and I suppose that is a subjective test. You have no method to determine degrees of bitterness? A. No, I haven't.

Q. So when you say bitter, what did you compare it to? Bitter related to what?

A. With almonds. We have sweet and bitter almonds, and the sweet peach or nectarine kernel tastes very much like sweet almonds or bitter al-

(Testimony of Frederic W. Anderson.)

monds. There are such tests to get the degree of bitterness, but I am not familiar with them. They merely use them. I don't know. I just go on taste, and as I said in my direct——

Q. In patent 974 does it show the taste of the pit?

A. I don't recall, I think not. I think even at that time I didn't realize that that was of any importance, but the Sun Grand does have a bitter pit.

Q. In other words, am I correct while you have similarity in variety you must continue your tests to various matters until you determine by a process of elimination? [83]

A. Yes, that is correct.

Q. All right. You indicated that there was one other, that is of the glands of the leaves. Will you take plant patent 974, Exhibit 1, and will you mark an arrow pointing to the glands, and just, if you can, designate the word "glands" at the point where you mark on Exhibit 1?

A. Figure 3 at the right hand corner, shows a leaf—this figure 3 down in the corner shows the leaf with the blade here, petiole here, and these little raised objects at the base of the blade and on the petiole are the glands. Those are raised and round in this case, and they will vary from one to, oh, maybe a half dozen, usually there are, oh, two or three on the petiole.

The Court: Usually arranged as they show on this leaf?

The Witness: I think fairly close to that.

(Testimony of Frederic W. Anderson.)

The Court: Yes.

The Witness: There is considerable variation in that arrangement on different leaves.

The Court: All right.

Mr. Griswold: Could we mark on the exhibit the——

The Court: Well, has he the exhibit?

The Witness: No.

The Court: You may mark it on the exhibit. Here it is.

The Witness: Right there.

Mr. Griswold: You mark it. [84]

The Witness: What do you want me to mark?

Q. (By Mr. Griswold): Just mark an arrow pointing to the glands.

(Witness marking.)

Mr. Griswold: Let the record show the witness is marking a circle around what appear to be—how many glands?

The Witness: Oh, the number is very variable. On this particular leaf there are four shown here.

Mr. Griswold: Will you mark an arrow to that and then write the word “glands”?

Q. I believe you claim in your plant patent 974 that the number of glands are average four in number.

A. “Average four in number; alternate, medium size, globose. Positioned mostly on blade, occasionally on petiole. No stipules.” That is a very variable thing. They will vary from—on this particular

(Testimony of Frederic W. Anderson.)

variety—two to five. Now I wouldn't be too sure that they would average that many. I don't think it is important, and I don't think it is when I write patents, the number. However, I have average four there. I think that average is high, high for most any variety with glands.

Q. Now, of the four tests which you have described——

A. Four tests?

Q. Yellow flesh, globose glands, red around the pit, freestone, and bitterness of kernel, which if any of these [85] are most important in your opinion, in making your determination which you have testified to?

A. Oh, I would say none were the most important, because it takes the whole group together plus many quantitative things, but the qualitative ones are the more important in that people can't disagree. When you come to quantitative things it is very difficult to get two people to agree.

Q. You mean everything else about plant patent 974 and the so-called Red King could be open to some subjective difference and not capable of mechanical or other finite measurement?

A. I think the answer is yes. However, that is covering a lot of ground.

Q. Well, I understood your answer to be that way.

A. Let's see, will you put that again. It is pretty long and pretty involved. Can you chop it up?

Q. You have testified that these four tests which you made——

(Testimony of Frederic W. Anderson.)

A. Pardon me. I named eight tests, but I didn't, however, see the flowers which was also a test.

Q. Do you feel in your opinion that the flowers are important?

A. The flower is very important. I know the flower on the Sun Grand, oh, yes, I have the Sun Grand flower here, yes, so it would be eight tests instead of four, qualitative tests. [86]

Q. Well, will you describe the flower of plant patent 974?

A. Well, it is just a large flower; the division I gave you was large and small, and it has the large type.

Q. You don't feel, though, that the flower would be important in making an identification as between 974—

A. It is very important; all these qualitative things are very important.

Q. Well, did you make an examination of the fruit, that is, the—withdraw that question. Did you make an examination of any of the flowers on the Hagler ranch?

A. No, I have never been at the Hagler ranch when the flowers were ripe.

Q. Did anyone under your direction or supervision? A. Yes.

Q. Who? A. Mr. Taylor.

Q. You instructed him to take specimens?

A. I instructed him to take pictures of it.

Q. And did he do that?

A. Yes, he took pictures from the air, and you

(Testimony of Frederic W. Anderson.)

can tell—and also observed them from the air, and the difference between large and small blossoms is so striking that he reported that they were large petals.

Q. You mean aerial photographs were [87] taken? A. Yes.

Q. From an airplane? A. Yes.

Q. And have you examined those photographs?

A. Yes.

Q. Are those in court? A. I don't know.

Mr. Griswold: Counsel, do we have those photographs?

Mr. Shepard: Yes. I don't know what he is referring to. I have some photographs.

Q. (By Mr. Griswold): Could you identify the aerial photograph which you made for determination of these blossoms?

A. Well, I think so. I think you can draw the dividing line between large blossoms and small blossoms. I will agree that there might be a possibility of error but I think it is very small.

Mr. Griswold: Could we have those photographs, counsel? I would like to see them and exhibit them to the witness.

Mr. Shepard: Your Honor please, we are back to the old stage where counsel wants to use the opposing party's exhibits. Now, I have certain photographs which I intend to introduce in due order by the person that took the photographs, and at that time I would be perfectly willing to have counsel

(Testimony of Frederic W. Anderson.)

recall this man to cross-examine on those photographs. [88]

The Court: I think you misconceive entirely the object of cross-examination of a witness like this. This man is your chief witness. He is the patentee.

Mr. Shepard: That is correct.

The Court: And therefore his relationship, his examination here bears on wilfulness, because if at the time this man visited there, he didn't inform the people of his suspicion that they were violating, or were infringing the patent, that goes to their good faith in continuing the activity and not destroying the trees. That can be brought out by cross-examination.

Mr. Shepard: I don't follow what that has to do with the question here.

The Court: Well, I rule that you are to show them to him, to give them to him, that is all there is to it.

Mr. Shepard: What is that, your Honor, the photographs?

The Court: The photographs he asked for. Supposing you are taking a deposition, you would have to produce them as discovery. This is a trial.

Mr. Shepard: That is correct, your Honor, but I object to counsel's tactics of trying his case with documents——

The Court: I am ruling, and I am not listening to speeches. Turn them over now, please.

Mr. Shepard: If that is the order of the Court, we will.

(Testimony of Frederic W. Anderson.)

The Court: That is the order of the Court. A lawsuit [89] has ceased to be a game; its object is to attain the truth, and a party can't say "these are mine." You brought this lawsuit, they have a right to go through your file and have you produce all sorts of things. They can't put you to unnecessary expense, but anything you have here they have a right to see, and if I rule they are material they go in regardless of the fact you may want to later on. I control the method of proof.

Mr. Shepard: Very well, your Honor.

The Court: A lawsuit is not a game.

Mr. Shepard: Well, your Honor, I have heard that said before and I fully agree with you. I am not trying to make this a game.

The Court: Well, that is all right.

Mr. Griswold: Mr. Anderson——

The Court: Too many people are reading books by Mr. Belli, which don't work in our courts, considering the law as a game of skill. That is not the law in the federal court and it isn't the law, according to my conception, in the state courts either.

Mr. Shepard: I have never had Mr. Belli's——

The Court: And under the rules of discovery it is not harmful. Why, I have had a patent case where as many as 100 patents, defense patents, were introduced by cross-examination of the plaintiff's experts. And this man is [90] offered not only as an interested party, as a patentee, he is an expert.

Mr. Shepard: That is right.

The Court: All right.

(Testimony of Frederic W. Anderson.)

Q. (By Mr. Griswold): Mr. Anderson, you have testified, I have asked you about the blossoms of what we claim to be the Red King, and you have testified that Mr. Taylor took certain pictures, or took certain photographs at your instruction, and I hand you certain photographs. Will you go through that group of photographs there, and sort out those aerial shots which in your opinion show the size of these flowers?

A. I haven't seen these, so I don't know they are even here. This is new to me, this part of it.

Q. Those two you have never seen before?

A. Well, I saw the—I don't know what you call them, I am not familiar with pictures. I saw the negatives, or whatever it is, and we looked at them through a blown-up machine and that is all that I have seen. These came today, I believe, and I glanced through them here, some of them, at the table, but other than that I haven't seen these. I thought these were all fruit, the ones that I saw were all fruit. I don't know, it might have been the negative of a picture like that, I don't know.

Q. Could we mark this— [91]

A. I don't know, I probably looked at all these.

The Court: If the witness does not identify them I am not going to let them go in as your exhibits. There is a limit to what you can do. Unless he identifies them you can't bring them in out of line as your exhibits. See the point?

Mr. Griswold: He is speaking to me.

The Court: I want them returned to counsel,

(Testimony of Frederic W. Anderson.)

unless he can identify them you are not entitled to have them.

The Witness: This is difficult for me because I haven't seen these before and I don't even know the blocks. Well, all of these that I have been looking at, the last three or four, I think I could tell that they were large blossoms, but from these I couldn't be sure which were large and which were small.

Q. (By Mr. Griswold): There are numbers on each one. Could you state which ones you can make that identification?

A. Well, I wouldn't be at all certain.

Q. The ones you think you might, just give the number. There is a pencil number on each one.

A. Well, this may not be at all accurate, but J-19, J-13, J-14, I would think that I could identify, but I wouldn't be sure about that now, but in any event Mr. Taylor told me from the air it was not easy but he would be certain [92] that these particular blocks were large blossoms; but from these pictures I wouldn't be absolutely certain, but I think those are—did I have J-18 there? But I wouldn't be certain of that.

Q. Mr. Anderson, I understand that you did take samples of the fruit from the Hagler ranch?

A. On which occasion are you now speaking?

Q. In 1957, and again in 1958?

A. No; I did not in '57. No; I took them in '58, but not in '57. I do think that some of the other

(Testimony of Frederic W. Anderson.)

members maybe took a few in a basket. I am not even clear on that now. I did not.

Q. Do you have any of that fruit that you removed, or anyone in your party, took from the Hagler ranch this year, 1958?

A. No; I do not. It has spoiled before now.

Q. Does Mr. Kim, if you know, have any of the fruit from the Hagler ranch?

A. I wouldn't know now, but he has told me that they were spoiled, all of them. But these pictures, by the way, that you showed me here of the fruit were taken approximately the time the trial—or the time we were notified the trial was not going to be held in September, we took them out of the storage place and they were not in very good condition, although still, they were able to photograph them, but even [93] then we had difficulty keeping them to that time.

Q. In your opinion is there any better test than the fruit itself to make identification of nectarine varieties?

A. I can't answer it that way. There are all things, the tree, leaves, flowers, fruit are all very important. The fruit is the final thing, of course. The fruit is the thing that is sold and is the final thing that must be certain.

Q. Would you, with your knowledge and background, endeavor to make an identification of a nectarine variety from the tree only, absent the fruit?

A. Never a positive identification. I can drive

(Testimony of Frederic W. Anderson.)

along the road and tell a Muir from an Alberta, for instance, but to make a positive identification and say that is a Muir positively and no other fruit in the world like that, I can't do it anyway, and I don't think anybody else can.

Q. How much fruit was taken in 1958 from the Hagler orchards?

A. Oh, it was only a small quantity. We took them from three different locations, and, gosh, I don't recall the quantity, but I don't think it would have been over—I think it would be less than 100 fruits altogether.

Q. From which locations?

A. Well, we took them from—well, of course, we took them from two locations, we made two stops, on Mr. Hagler's place. We took in addition samples from a tree on Mr. Hunter's [94] place. We kept those separate.

Q. All right.

A. But they were identical as far as I could observe.

Q. Directing your attention to the Hunter ranch, that is the place you said you visited in 1954, and identified two trees as being of the 974 patent?

A. Identified one positively, and one not positively.

Q. This trip in 1958, you returned to the same location in the Hunter ranch, did you not?

A. I am quite dubious about that. In fact, I personally don't think so.

(Testimony of Frederic W. Anderson.)

Q. You did find a tree, one tree that had fruit which you claimed to be Sun Grand?

Mr. Shepard: Which year?

The Witness: Which year?

Q. (By Mr. Griswold): 1958.

A. Yes, I—Mr. Hagler and Mr. Houk took us to a tree that they said was a parent tree they had budded it from, Mr. Hagler had budded these blocks, and I got fruit from that tree which I identified as Sun Grand.

Q. Did you on this second visit look for the other tree which you identified as being Sun Grand in 1954?

A. I didn't look for it, but Mr. Hagler brought it up and said, "Where is that second tree," and I said, "Obviously [95] it isn't here, the trees all around are LeGrand," and that was as far as it went. Mr. Houk was in a hurry to get away for some reason, and I didn't ask to be shown the other tree. In fact, I had—well, that would be going too far again. Can I give my reasons there, your Honor?

The Court: Yes; you may.

Q. (By Mr. Griswold): Go right ahead, Mr. Anderson.

A. Well, I didn't request it. I figured it was of no importance, because the tree they showed me was Sun Grand, and they said they got their buds from that tree so I didn't care one way or the other. The tree they said they got their buds from was also Sun Grand.

(Testimony of Frederic W. Anderson.)

Q. Then am I not correct that in your deposition, that this second tree which you claim to be Sun Grand was next to the tree that had the fruit on it?

A. That is correct.

Q. What I am asking you, did you in this second visit some four years later, where Mr. Hagler and Mr. Houk took you to show you this tree from which they claim they got the buds for their other orchard, did you look to see if you could find this other tree?

A. No; I did not because, as I told you, I figured it was of no importance. This was Sun Grand and if that was the tree they got the buds from it didn't make any difference. [96] In fact—I am afraid I am transgressing, your Honor.

Q. No; I am interested. As cross-examination I want to find out, because I am curious, I want to know.

The Court: Now, he has already told you. If you want to confront him with something in the deposition—has the deposition been filed?

Mr. Savage: No.

Mr. Griswold: Where is the original deposition? I think we should have it filed. I think the witness has acknowledged that he did so testify in his deposition.

Mr. Shepard: Well, wait a minute.

The Court: Just a minute. The main point is this, gentlemen, if there is a deposition, the original should be filed, and then counsel can save time by merely pointing to the question and you will prob-

(Testimony of Frederic W. Anderson.)

ably stipulate that he so testified, and it would save time. If the deposition is on file it is probably sealed and has to be unsealed. If it hasn't been filed it ought to be filed, if it is going to be used as the basis for cross-examination of this witness. He not being a party it cannot be used for any other purpose.

Mr. Griswold: Mr. Anderson, I show you your deposition, the original——

Mr. Savage: Just a moment, counsel. We want to do what the Court wants us to do. These depositions have not been filed. [97]

The Court: They have to be filed, otherwise they cannot be used.

Mr. Savage: Then let him file them.

Mr. Griswold: I will file them.

Mr. Savage: I think the deposition is not signed, the original.

Mr. Griswold: I will make the offer of filing.

The Court: They are certified by the notary, he hasn't signed them. Did you waive signature?

Mr. Shepard: We waive signature, your Honor. I don't know whether this—what he is bringing up has anything to do——

The Court: That is not for you to decide. That is for me to decide. Depositions are taken to be used.

Mr. Shepard: Certainly, we want him to use it.

The Court: Well, are you now raising the point that it has not been signed?

Mr. Shepard: No.

(Testimony of Frederic W. Anderson.)

The Court: If so I will order the witness to read it between now and tomorrow and decide whether he wants to sign or not.

Mr. Shepard: We would offer it as it is there, your Honor.

The Court: It is not offered. It is not offered at all. The deposition should be filed, otherwise there is nothing upon which to go.

Mr. Shepard: What I am trying to say is, we have no [98] objection to it being filed, as you have it in your hands, with the exception that there are certain technical words in there that Mr. Anderson has pointed out to me were in error, and it is my fault——

The Court: Subject to any correction.

Mr. Shepard: ——they were not corrected.

The Court: This deposition by being filed does not become an exhibit in the case. It is merely a part of the file.

Mr. Shepard: I understand.

The Court: And each side may use it only for cross-examination, except in the case of a person who is also a party.

Mr. Shepard: Oh, yes.

The Court: In which event it may be used for all purposes.

Mr. Shepard: We have no objection to it being filed.

The Court: All right, you file this. Mark it filed. Then you point to the particular question and

(Testimony of Frederic W. Anderson.)

you will stipulate as to whether he so testified and we will gain time. All right. What page?

Mr. Griswold: Page 13 of the deposition, starting on line 1.

The Court: Look at page 13 and tell him what line.

Mr. Griswold: Starting at line 1, and continuing on until page 15, line 6.

Mr. Shepard: Your Honor, may I have the opportunity of pointing out to the witness that he submitted certain technical words [99] to me, I think about ten, scattered through the deposition? I don't know whether this has anything to do with it, but I think I should tell him that I haven't changed those in the deposition at all.

The Court: They can be changed later on. Will you stipulate that the witness testified as indicated on those lines, subject to correction as to scientific terms which may be wrong?

Mr. Shepard: We certainly will.

The Court: All right. Read them to the Court and put the question to him, if you want to put a question to him.

Mr. Griswold: I will read the part that I designate.

The Court: That is right.

Mr. Griswold: "A. We stopped at the road and went in to Mr. Hunter's orchard where they were picking.

"Q. And then you and Mr. Harry Kim and

(Testimony of Frederic W. Anderson.)

Mr. Stafford proceeded to walk around the orchard looking for what you could find, shall we say?

“A. No; that isn’t quite true.

“Q. Then you tell me.

“A. We started over and Mr. Kim said something to the effect that, well, ‘Mr. Hagler said that this variety came from along the edge of the LeGrand block, and I assume it will be along here.’ So we were walking along over toward where they were picking. I said, [100] ‘Well, there is two trees that certainly aren’t LeGrands,’ and he looked at them at some length or one of them. We found fruit. Well before we had seen the fruit, I said, ‘Well, they look like Sun Grand trees.’ And then when we found the fruit we all agreed that it was Sun Grand and we proceeded on. And just before we got over to the pickers Mr. Hunter advanced from the pickers and Mr. Kim introduced us, asked about this tree that Mr. Hagler had got the fruit from and Mr. Hunter immediately took us over to the tree and showed it to us.

“Q. Just one tree?

“A. Well, Mr. Hunter just showed us one. I thought that tree adjoining was Sun Grand, but, however, we had found no fruit on that, and I don’t recall that we asked Mr. Hunter about that.

“Q. And why did you determine that tree next—which tree was it; which direction from the tree——

“A. The tree that had the fruit on it was one tree east of the tree that Mr. Hunter showed us,

(Testimony of Frederic W. Anderson.)

was one tree east of the other that I thought also was Sun Grand.

“Q. Why did you think the tree that would be the western tree, was in the next row to the west?

“A. According to which way you think the rows run, [101] the next tree to the west.

“Q. All right.

“A. Why did they think it was Sun Grand? Sun Grand grows very different than the LeGrand, and even before I came to them I thought they were both Sun Grand. And when I examined them they both had globose glands. The LeGrand has reniform glands, and I thought they were Sun Grands. The fruit apparently had been harvested, but after sampling some on one tree, we found a few fruits underneath, and they were definitely Sun Grand.

“Q. Well, the tree did not have any fruit, what were its characteristics that you observed on that tree that led you to believe that it was Sun Grand?

“A. It had a growth of Sun Grand, and then the leaves were also globose glands, and the type of leaf that Sun Grand has.

“Q. What kind of growth did it have?

“A. The Sun Grand is a much more vigorous grower than the LeGrand, more upright, more what I called the level type of growth. It is different than the LeGrand. LeGrand is short, stubby, sturdy grower, more like the J. H. Hale, and Rio Oso, that type of growth.

“Q. What else did you observe about that tree

(Testimony of Frederic W. Anderson.)

that had no fruit on it that led you to believe it was Sun Grand? [102]

“A. I don’t know that I made any particular examination that would make me certain that it was Sun Grand. I thought it was Sun Grand.”

Now, this second visit in 1958——

Mr. Shepard: May I point out, I don’t want to take away the significance of whatever that was, but there were two words that you noted to me, Mr. Anderson, at line 14 there, on page 14, instead of “sampling” you suggested that should have been “searching”; and on line 24, on page 14, instead of “level” you suggested “Lovell.”

The Witness: That is correct. May I——

The Court: Yes.

The Witness: That is correct, I made those two corrections. They are obviously mistakes that the stenographer did not understand me.

The Court: Well, all right. The corrections may be made on the record where you indicate. All right. Go ahead.

Q. (By Mr. Griswold): When you visited again this area of the orchard in 1958 as you have testified, did you make an examination of this second tree which you referred to in your deposition, which you identified as Sun Grand or plant patent 974?

A. I have already told you that I thought it was one, the same tree—not either of these two trees, the one Mr. Hagler showed me that he got

(Testimony of Frederic W. Anderson.)

the buds from I thought was [103] not either one of them. I am not sure of that, but I don't think so.

Q. Well, as near as you recall then, it was some other part of the orchard that you were in in 1954?

A. I wouldn't say it was another part of the orchard. It was reasonably close there, but I think—maybe I—

The Court: Go ahead. Go ahead. You may explain your answer.

The Witness: I think at that time—

The Court: I don't want to cow you. You don't look as though somebody could scare you.

The Witness: It is a little difficult, it is for me anyway—there is nothing in that answer, in the deposition that I object. I would answer exactly the same, and I think I have before you got to this. And I said at that time, at the time of the deposition, I had not been back since 1954 but from the description I made I didn't think it was the same tree, and after I went this year in 1958 I still didn't think it was the same tree, although I concede that after that length of time, with no notes, that I could be wrong, but I don't think so, and mainly on the thing that the tree next to it, the tree to the west, was obviously LeGrand and it was obviously an original tree, and so I don't think it was the same location. And the other reason I didn't think it was the same location is that I didn't think we were that [104] close to the east edge of the orchard. My memory said that it was on the—just adjoining the LeGrand block, the first row outside,

(Testimony of Frederic W. Anderson.)

in a home orchard, and I still think that. I don't know. I never went back in '58, so I don't know.

The Court: I think the witness has sufficiently answered. I think we ought not spend more time on this. He has given his impression and his explanation, so let's go to the next subject.

Q. (By Mr. Griswold): Now, did you examine—withdraw that question. I want to make a difference now and call your attention to the fruit that you took off of Mr. Hagler's ranch and the fruit that you took off of this tree on the Hunter property which Mr. Hagler claimed to be his discovery tree.

A. What was the question? I understand what you said all right.

The Court: It wasn't a question, it was a statement.

Q. (By Mr. Griswold): Did you take fruit specimens from both, we will call it Mr. Hagler's discovery tree on the Hunter property in 1958?

A. Yes; we took—as I told you, we took from two blocks on the Hagler place, and one tree called the parent tree on the Hunter place.

Q. And did you mix those fruits?

A. We did not at the time, we kept them [105] separate.

Q. And you took no photographs until approximately September of 1958, is that right?

A. We—yes, that is correct. We assumed we would have them for the trial, and then when the trial was delayed I instructed Mr. Taylor to make

(Testimony of Frederic W. Anderson.)

photographs himself, and also after he did that I told him I thought he better have some commercial photographer make them, and so he took two sets, that is, he took one and the photographer took another.

Q. You testified at one time part of your work was trying to discover sport growths or sport trees, is that right?

A. You mean back in the '20's?

Q. Yes; bud sports that would give better strains?

A. Yes; there was a theory at that time, and still held by some that you can get bud sports that give better varieties and we looked for them, and we had many reports of them and we ran them down and examined them.

The Court: Isn't that what is known as the De Vries Theory of Mutation?

The Witness: That is correct, your Honor, although the De Vries Theory of Mutation covers much larger ground.

The Court: Well, it covers biology just as—you named the other man.

Mr. Shepard: Mendel.

The Court: Mendel, the priest. The Mendellian theory, while it was evolved in the realm of plants, is applied [106] biologically.

The Witness: Yes; everywhere in the biological field.

The Court: All right.

Q. (By Mr. Griswold): I will ask you this question: You are familiar with the tree that Mr.

(Testimony of Frederic W. Anderson.)

Hagler claims sported or was a mutation. Now, you have been shown the tree.

A. Which tree are you speaking of now?

The Court: I think that goes clearly out of the line of cross-examination.

Mr. Griswold: I will withdraw the question.

The Court: I merely made the statement to show my familiarity with the general theory of biology, that is all.

Q. (By Mr. Griswold): That is one way, mutation, is it not, that new varieties are brought into existence, into being? A. Yes.

The Court: Go ahead, you may explain. You hesitated. You may give a reason.

A. Yes. I think I made the explanation when we discussed mutation, mutations cover a broader field. This they said was a bud sport. Now a bud sport is a mutation, but it is a special kind of a mutation that comes only from buds.

Q. (By Mr. Griswold): Am I correct that if a nectarine was a mutation that [107] it would be extremely remote, if not impossible, to be the same as plant patent No. 974?

A. Yes; you are wholly correct.

Q. So, in other words, the chance of a mutation having all the characteristics of your plant patent 974 is impossible, or could we go that far?

A. It is going very far.

The Court: I presume "remote" would be a better word.

The Witness: Yes; extremely remote. It has

(Testimony of Frederic W. Anderson.)

never happened in the history of horticulture, but that is not saying that it couldn't be some place.

The Court: Might not be done.

Q. (By Mr. Griswold): Did you know before today that Mr. Lyle Hagler had been granted by the United States Patent Office plant patent 1718?

A. Yes; I did.

Q. When did you first find that out?

A. Well, I first found it out, I think Mr. Shepard told me, I don't remember the date, some time before the original trial was scheduled, some time in the summer, and then I read about it and sent for copies from the Patent Office, and got four copies of it along about, I think about the first of September, somewhere in September.

Q. You are also familiar, I think you testified about—— [108]

The Court: I want for the sake of the record to indicate that so far as I know this case has never been set for trial before. Is that correct?

Mr. Shepard: No, your Honor, it was set for trial on September 14th and 16th, and because Judge Jertberg was elevated, he postponed it.

The Court: Yes, you gentlemen called up and I told him that he could put it in and I would try it. I dislike an intimation that cases are not tried promptly when I and other Judges are volunteering to fill in the vacuum which the President created by not appointing a successor to Judge Jertberg.

Mr. Shepard: We have no criticism of anybody, your Honor.

The Court: As a matter of fact, I superimposed this case upon another case, and if that case had gone to trial you would have had to trail behind it. Now that everybody talks about delays, I want to say there are no delays in this court, in this division or the central division; cases are being tried as fast as we can possibly try them. In fact, some lawyers are complaining we are trying them too fast.

Mr. Shepard: That is correct. We just wanted——

The Court: This case was not set before that time. It has been pending for over a year but it was set and couldn't be tried because he was promoted—as a matter of fact, he ceased to be a Judge and only by grace was he allowed to act, [109] because he had himself appointed for a month so as to be able to help.

Mr. Shepard: That is right, your Honor.

The Court: All right. Now let's make the record straight, because I want the laymen to understand these things. You know they go out and they hear speeches which are fantasies and do not represent facts. All right.

Mr. Griswold: I have no further questions.

The Court: Any redirect?

Mr. Savage: May we have a moment, your Honor?

I think at this time there are no further ques-

(Testimony of Frederic W. Anderson.)

tions. We will probably want to recall him in rebuttal.

The Court: He can be called at any time you want. All right, gentlemen, this is a good stopping point. It is nearly a quarter to five, and we will take a recess until tomorrow morning at the usual time.

(Thereupon, at 4:40 o'clock p.m. a recess was taken until 10:00 a.m., on November 5, 1958.) [110]

November 5, 1958—10:00 A.M.

The Court: All right; cause on trial.

Mr. Shepard: We will call Mr. William Taylor.

JAMES WILLIAM TAYLOR

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: James William Taylor.

Direct Examination

By Mr. Shepard:

Q. Mr. Taylor, where do you reside?

A. I live at LeGrand, Route 1, Box 115, LeGrand.

Q. And how long have you lived there?

A. I have lived there since 1953.

Q. How old are you?

A. I am 34 years old.

(Testimony of James William Taylor.)

Q. Married and have children? A. Yes.

Q. Now, then, what is your particular occupation at the present time?

A. I am a plant breeder.

Q. Will you tell us where you began your education in that field, or related fields, going back to your first college?

A. Well, I grew up on a farm and, of course, went to [113] elementary school, high school, and then to the University of British Columbia in Canada. I acquired the degree of Bachelor of Science in agriculture, with major in horticulture and minor in botany.

Q. What year was that?

A. That was between 1942 and 1947.

Q. After you graduated from British Columbia, the University of British Columbia with your Bachelor's degree, what activity did you follow then in relation to agriculture?

A. I worked for a brief period with the British Columbia Agricultural Department and then in the fall of 1941 I went to Hawaii as a trainee with the Hawaiian Sugar Planters Association.

Q. During the fall of what, 1941?

A. Excuse me. 1947. In 1947 I went to Hawaii with the Hawaiian Sugar Planters Association as a trainee. During a period of something over a year we took 28 units at the University, and six weeks with each of their experimental departments. A good part of that time, about a month and a half of that time was spent with Dr. Mangelsdorf.

(Testimony of James William Taylor.)

Q. Now, the experimental line had to do with what phase of horticulture?

A. Well, the Hawaiian Sugar planters is sugar production, which covers all the experimental agricultural aspects.

Q. Yes. Part of your particular activities, did that [114] have to do with plant breeding?

A. Yes. After completing the course I worked with the Ola Kelly Sugar Company, and during that period we looked after the variety program and other experimental activities in agriculture.

Q. What was the objective of the variety program?

A. The objective of the variety program was to select new varieties that were superior to the ones they were then growing, in sugar content and other characteristics.

Q. In your experimental activities did you cross breed, and so forth, or not?

A. Yes; in our basic work with Dr. Mangelsdorf we worked with him during one season in crossing and seed growing.

Q. Now, after you had spent some time in Hawaii on sugar plants, and so forth, you returned to California, as I understand?

A. Yes; in 1950 I returned to California, and entered the University of California at Davis. There I obtained my Master's degree in pomology in 1952.

Q. Now, what in particular, did you develop as a thesis for your Master's degree?

(Testimony of James William Taylor.)

A. My thesis, my work on my thesis was on interspecific hybridization of apricots and plums.

Q. And does that involve cross breeding?

A. I made many crosses attempting to get this interspecific [115] cross and was successful upon—in several of them.

Q. While you were going to Davis there, during the summer and at other times, did you have occasion to actually work as well as study?

A. In my academic work I always took the course for one year, or two semesters, and in 1951, the summer, I worked with Dr. Probststein in tree fruit, experimental work. Then in the fall I joined Dr. Lilland and worked with him until March of 1953 on fruit experimental work with—in relation to nutrition and other problems.

Q. Now, since 1953, what has been your occupation?

A. In 1953, I joined Mr. Anderson in Merced, as a plant breeder.

Q. And what is your particular job, associated with Mr. Anderson? A. I——

Q. Describe generally.

A. I look after the experimental work that goes into the development of new fruits. I look after the crossing in the spring, collection of pollen, and the labor that they use.

Q. What is the majority of your experimental work with, what kind of fruits?

A. The majority of our work is tree fruit, with nectarines, peaches, apricots, almonds, plums, and

(Testimony of James William Taylor.)

other— [116] some other minor crops, along with grapes, being a major crop.

Q. Do you belong to any associations devoted to pomology?

A. Yes; I belong to the American Pomology Association, and the American Horticultural Society.

Q. With respect to the American Pomology Association, would you describe what that is, who the members are?

A. It is one of the oldest horticultural associations in America. That is mainly made up of scientific workers and interested people in variety work.

Q. And do you hold any particular office in that association?

A. Yes; I am a member of the regional committee, which is drawn up to help promote variety interest work.

Q. Which region is that?

A. It is the southwest, I believe.

Q. Does this association cover the entire United States? A. Yes.

Q. By way of relation, who are the other members of your committee in this western regional committee?

A. The other members of the western regional committee are Dr. Weinberger.

Q. Who is he?

A. He is director of the regional Department of Agriculture here, on horticulture, here in Fresno. And Dr. Reed M. Brooks, at Davis, who is in charge

(Testimony of James William Taylor.)

of the plant [117] breeding program; Mr. Merrill at Red Bluff.

Q. Mr. Grant Merrill? A. Yes.

Q. Now, have you besides your work taken time to make any papers in your professional field? Have you done any research or written any papers?

A. Yes; I have written various—two papers, one on embryo culture of peach development.

Q. Where has that been published?

A. Published in the proceedings of the American Society of Horticulture.

Q. And the other paper?

A. The other paper was a report on progeny of late maturing mutations of peaches and nectarines.

Q. Where was that published?

A. That was published in the Variety Digest, the Horticulture Variety Digest.

Q. So since 1953 you have professionally devoted your whole time to plant breeding and allied horticultural fields, is that correct? A. Yes.

Q. Now, I take it that you were instrumental in aiding in the development of the new patent varieties Mr. Anderson has spoken of before?

A. Yes; I did considerable selection during the summertimes, [118] I spent all my time on the selection of new varieties.

Q. And one of your primary concerns in this program is the development of new and distinct varieties, is that correct?

A. Yes; that is our aim, is to develop better

(Testimony of James William Taylor.)

varieties than the existing ones that we are now growing.

Q. Now, without repeating what Mr. Anderson has said before, but in order to get your independent ideas on the subject, would you generally give us the method, scientific method of distinguishing between varieties of nectarines, or other tree fruit if that can be included in the method?

A. I believe that in nectarines and peaches that are related—well, they are one and the same except for a single factor that should be included, so in your qualitative factors are of first concern, the differences between different varieties. I think I would be repeating possibly if I went through them.

Q. Just enumerate them briefly.

A. First of all, your globose, reniform, your glands, whether globose, reniform or eglandular. Second, you would have nectarines and peaches, with fuzz or without fuzz. Third, you would have yellow flesh versus white flesh, and in some instances red flesh.

Q. All right.

A. Fourth, freestone or clingstone. Fifth, the flower type, as to whether it is large or small, or in between possibly, [119] medium size.

Q. Do you attach significance to sterility, or not?

A. You have pollen, sterile type—to the person that knows antler types he can determine pollen sterile and fertile types.

(Testimony of James William Taylor.)

Q. Do you classify that as a qualitative or quantitative characteristic?

A. That is qualitative. Then you have the pit, as to the kernel, as to whether it is sweet or bitter.

Q. Does coloring have any bearing on the qualitative characteristics?

A. Certain of the peaches and nectarines are yellow through to the pit, and lack red coloring, so there is the difference between red color at the pit or cavity.

Q. Now, then, there must be other characteristics, such as type of trees, size of the leaves, color of the fruit, and other things a layman could think of. What type of characteristics are those?

A. Yes; there are many quantitative characteristics within a range, within a particular background, that will differ from variety to variety, but there is a range.

Q. Let's take the characteristic that hits the eye of the average layman the first thing, as far as fruit is concerned, I think, the color of the fruit, whether it is red, yellow or white, whatever it is. Now, what sort of identification [120] characteristic is that?

A. In the extremes of this particular factor there would be definite differences, for instance, one that didn't develop red on the outside to any extent or very little, to one that was completely red, and this color of red outside color is a variable from hard ripe, or you have a green fruit that may slightly have some red color before it is green, then

(Testimony of James William Taylor.)

as it ripens it turns to yellow base color, and depending on the variety and the position in the tree the red color that is taken on will be within a certain range. It may be in the same tree from the outside completely red, to the inside shaded portion where it might be of portions yellow or to the extreme portion of yellow with very little red.

Q. All right. I think you have answered my question, but to put it bluntly, within the same tree, one given tree, on a given day, first off, will there be different periods of ripening or will all of the fruit on that tree be of the same degree of ripeness on that day?

A. No; the positions and other factors cause differences in ripening of the fruit on the same tree. In harvesting, in most cases, depending on the variety, there will be two or more pickings, according to the maturity of individual fruit.

Q. By the same token, on the same day in the same tree, [121] will all of the fruit be of uniform color?

A. No; there is a range of color rather than a uniform color, because you have a yellow under-color in the fruit we are discussing at this time.

Q. Let's just keep this generalized.

A. Let's speak of yellow fleshed peaches and nectarines, is that permissible?

Q. Yes; go ahead, take that for an example.

A. You then have a yellow under-color developed with the red color that develops over that yellow color as the fruit matures, giving a varia-

(Testimony of James William Taylor.)

tion from the yellow portion to an orange to the red over-color.

Q. Now, if we can set up a hypothetical situation, which I am sure we would have difficulty duplicating in the field, but if you can visualize a tree, take the Sun Grand tree, growing up in your locality, say LeGrand, California, the same age and as nearly as possible the same conditions, that is as to maturity, growth of the tree, and taking a fruit which is in the same location, that is, we will say the south side at the top exposed. If you could duplicate that same tree, and pick out fruit in identical position on the same day in some other locality in California 100 miles distant, would you necessarily expect to find those fruit of identical color?

Mr. Griswold: May I inquire, is this a [122] hypothetical question, or based on an actual test?

Mr. Shepard: No; this is a hypothetical question.

A. Well, being a hypothetical question——

The Court: I don't see what bearing it has upon the issue before us.

Mr. Shepard: Let me withdraw it and ask it a different way. Does the color of a given fruit at a certain date of the year stay uniform in different localities?

A. No; speaking now of broad differences in making it easier to point up my case, the weather conditions or other conditions affecting the fruit

(Testimony of James William Taylor.)

can cause differences just as the foliage can, the fruit within the tree.

Q. Does the soil condition have anything to do with the fruit maturing and coloring?

A. Yes; very much so, soil conditions, you have a large field.

Mr. Shepard: Your Honor, the purpose of this is the fact that there will probably be in evidence references to samples of fruit from different localities in the Valley here.

The Court: Well, you are anticipating something that isn't before the Court.

Mr. Shepard: I am laying the ground work for samples that we will bring it, your Honor.

The Court: I see.

Q. (By Mr. Shepard): Now, Mr. Taylor, one other thing in these [123] qualitative characteristics, the ripening period, will you explain a little bit about the ripening period of fruit in general?

A. The ripening period of fruit in general, say for a specific variety, will vary depending on factors affecting it from year to year, in that one year you will have to start picking a few days earlier possibly than the next year, or a few days later, or whichever way, put it vice versa.

Q. In describing the ripening period of a fruit, of one given fruit, can you safely describe it as ripening or describe it as having a mid-range or an average ripening day or a given calendar date every year?

A. You can't put it on a calendar basis, but

(Testimony of James William Taylor.)

you can compare it with a variety that is well known.

Q. Can you put it on a calendar date?

A. No; you can't put it on a calendar date.

Q. And have an accurate description year after year? A. No; you can't.

Q. Now, I take it among all your studies that you have certainly read most of the outstanding works on pomology?

A. Well, I have read a good many of them.

Q. All right. Now, in your opinion, what would you say is the most accurate way to describe the ripening period of a given fruit?

A. The most accurate way is to compare it with a well-known [124] variety, as to so many days before or so many days after. There is some variation even in this because of weather conditions affecting the fruit that is in question and is actually ripening.

Q. Would you explain that a little further? Say that you have a given fruit X, and A is a well-known fruit, and you say that X ripens two weeks ahead of A. Would it be true it would ripen two weeks ahead of A every year out of ten?

A. No, sir; you would have to give a range, probably, you can say it ripens approximately two weeks before, but that includes a range within a few days one way or the other.

Q. Now, will you explain why, even comparing them with fruits, there might be a difference year

(Testimony of James William Taylor.)

after year as to the range in the interim between the ripening of those two fruits?

A. I am not sure that I——

Q. Maybe I can take an example. Do you know offhand when the J. H. Hales ripen?

A. Oh, depending on the locality, in that particular locality they ripen about the first week of August.

Q. And give me a fruit that ripens a month earlier than that, a well-known variety.

A. Well, let's put it this way, if you don't mind, that July Alberta ripens two to three weeks ahead.

Q. Now, you say the July Alberta ripens two to three weeks ahead of the J. H. Hale? [125]

A. Right.

Q. Now, in a particular year, is it possible that it might ripen just two weeks ahead of the J. H. Hale?

A. Yes. When I say two to three weeks, I mean, speaking of a range again.

Q. Will you explain why there can be that variation in range?

A. Well, I don't know that it is known, the facts that go to make up the conditions are known. There are various factors that cause development of fruit, and we might put in weather, climatic conditions as being one, but the factors are not completely known that cause it. You may have individual factors such as irrigation that may have something to do with it, other orchard factors.

Q. I think you have covered that subject. One

(Testimony of James William Taylor.)

thing more I omitted: In your qualifications you have traveled somewhat more than we mentioned here. In your plant breeding and pomology study you have gone as—would you describe some of the other places?

A. Yes; I have been in the east three times with the different groups of men at the different experimental stations going over their collection, seeing what they are doing, and the extent of their programs.

Q. University or government?

A. University and government stations, yes, and this [126] past winter I was in South America, Chile, studying this variety program situation and the possibilities of fruits that might be of value to us here.

Q. All right. Now, in 1957, did you have occasion to go to the L. A. Hagler ranch?

A. In 1957, yes.

Q. Year before last? A. Yes.

Q. And approximately what time did you go down there, do you remember?

A. If my memory is not completely wrong it was somewhere in the latter part of July.

Q. And who did you go with on that occasion?

A. The same group that was mentioned yesterday, Mr. Anderson, Mr. Kim, Mr. Stafford, Mr. (unintelligible).

The Court: You dropped your voice and no one heard you.

Mr. Shepard: You will have to speak up louder.

(Testimony of James William Taylor.)

The Witness: Shall I start over again?

Mr. Shepard: Mr. Taylor, maybe I can help you. You talk so I can hear you, not to the lady there. Talk to me, not to her, she will hear you.

The Witness: Mr. Anderson, Mr. Kim, Mr. Stafford, Mr. Zaiger, Mr. Casabian, I am not sure of the spelling.

Q. (By Mr. Shepard): Zaiger, was it? [127]

A. Yes.

Q. And Casabian?

A. I am not sure of that name, but I believe that is the way it is pronounced.

Q. You are not acquainted with him?

A. No.

Q. Now, then, would you describe as best you can what part of the Hagler ranch you went to?

A. Well, we went past the building, oh, I suppose, in memory, it would be half, three-quarters of a mile, and turned right.

Q. You went past his ranch farmstead?

A. Yes; went south some half, three-quarters of a mile, I am not sure of that distance.

Q. Yes.

A. Turned right, for another distance of three-quarters of a mile, I wouldn't be sure of the distance, then turned right in along the eastern side of the orchard—the western side of an orchard.

Q. Western side of an orchard and was that situated up against any feature of the landscape there?

A. Well, I believe there are some power poles

(Testimony of James William Taylor.)

on the west side, and drainage canal on the—as we went back into the orchard at the far end of the drainage canal running east and west. [128]

Q. Now, then, make reference to the drainage canal, the trees that were adjacent thereto. Maybe we could use a picture.

A. Well, at that time I think there were—sorry.

Q. I will stop here for a moment and change the date, so we can introduce this picture, and I think we can describe where you went by the picture. Did you have occasion to take some aerial photographs of Mr. Hagler's ranch later?

A. Yes.

Q. Approximately what time?

A. Approximately the first week in March.

Q. The first week in March of what year?

A. This year, 1958.

Q. And who was with you when the pictures were taken?

A. Mr. Howard Stafford.

Q. Howard Stafford. Who was flying the airplane?

A. Mr. Stafford was flying the airplane.

Q. And who took the pictures?

A. I took the pictures.

Q. Do you recognize the picture in front of you?

A. Yes; I recognize the picture.

Q. Would you describe what that picture portrays?

A. Well——

Q. Just what part of the ranch does it describe?

A. Well, this describes the road we took back

(Testimony of James William Taylor.)

into the [129] orchard, runs parallel to the base of this picture, back to the east-west canal.

Q. The drainage canal you made reference to, is that in the picture?

A. Yes; that runs across the picture.

Q. All right. Now, does that picture show the area that you visited on the ground in the latter part of July, 1957, which you started to describe a minute ago?

A. Yes; that area is in the picture.

Q. You might explain, the picture is a little bit dark, is that true?

A. Yes; these, of course, were taken with 35 millimeter and then blown up to this size, also because of the aerial, taking it through the window, it shows it somewhat dark.

Q. All right. Does that picture fairly portray, understanding this is an aerial photograph, the relation of the canal and the orchard and the adjoining fields of the orchard that you looked at there?

A. Yes; it does.

Q. And the rows of trees appear in the photograph there?

A. Yes.

Mr. Shepard: We would like to introduce this as Plaintiff's Exhibit next in order.

The Court: It may be received.

(The picture referred to was marked as Plaintiff's Exhibit 4, and was received in evidence.) [130]

Q. (By Mr. Shepard): Now, you can remem-

(Testimony of James William Taylor.)

ber that picture while the Court is looking at it, the drainage canal appears as the large blue line in the picture there? A. Right.

Q. The trees that you observed appear as a block of light colored trees, almost square?

A. Yes; that's right.

Q. And they are adjacent to the canal, being the blue line? A. Right.

Q. And appear about in the middle of the photograph?

A. Yes; middle to the lower left-hand corner.

Q. Yes; I will have you circle them.

The Court: The colors are not very distinct.

The Witness: Yes, because this was a block, you see, here is light pink color.

Mr. Shepard: Speak up loud so we can hear.

The Witness: Light pink color, in relation to this which is darker green. (Indicating.)

The Court: All right.

Q. (By Mr. Shepard): Now, the first row of trees next to the canal, did you observe those at that time, or not?

A. No; I didn't observe those at that [131] time.

Q. All right. With reference to the canal, which block of trees or which group of trees did you observe?

A. Well, I went to what we spoke of as that square block. It was somewhat along there, along the center of it, would be some ten rows from the canal.

(Testimony of James William Taylor.)

Q. Ten rows from the canal?

A. In that general area.

Q. And that was also the rows that end along the telephone poles in the picture?

A. That's right.

Q. Now, can you point out on this picture more or less the general location where you were in 1957?

A. Somewhere along in here.

Q. Just make an "X" or a circle at the general location. Make it hard, so it will stay on the picture.

A. It is marked.

Q. All right. You have drawn a circle on the photograph in black crayon, and maybe you had better make a line out to the side and put your initials "W.T." or "J.W.T.," whatever it is.

A. (Marking on exhibit.)

Q. All right. Now, within that block of trees, did you examine some of the trees, representative trees?

A. Yes; I examined the trees in the area.

Q. Now, would you describe the trees that you saw at [132] that time? A. Well——

Q. First off, we might say, did they have leaves on them?

A. Yes. At that time they were, of course, in full foliage, being the center of the summer. The leaves were globose, globose glands was the nature of the glands. The trees were a medium growth orchard.

Q. As between nectarines, how would you de-

(Testimony of James William Taylor.)

scribe the growth of the trees, was it weak or strong or medium, or what?

A. Medium in growth, in vigor, shall we say.

Q. Yes. Now, did you examine the leaves of the trees?

A. Yes; I examined the leaves and found them to be globose as far as the glands were concerned on the leaves.

Q. Now, I will have to jump a bit because you were not there during the flower season at that time, in 1957?

A. This was in the summer, rather than the spring.

Q. Yes. Did you have occasion to see that same orchard while it was flowering later?

A. From the air, yes.

Q. And is that when you took this aerial photograph?

A. That is when I took this aerial photograph.

Q. Now, were you able to determine from the air what type of flower or blossoms the trees had which you had walked on the ground and seen in the summer? [133]

A. Yes; my visual observation was that it was a large flowering type, because of the difference which you see from the air in the large flowers versus small flowers.

Q. Now, have you made air observations of orchards before?

A. Yes; I have done considerable flying hours observing orchards from the air.

(Testimony of James William Taylor.)

Q. Will you describe just briefly what that consisted of?

A. Consisted of looking for the large blossom types in relation to the small blossoms.

Q. In what sections of the country?

A. Throughout the central valley.

Q. Have you taken photographs of the central valley orchards from the air?

A. A great portion of the orchards with large blossoms.

Q. And what is the objective of those flights, to keep up on the identification of trees in small part?

A. Well, the objective is that the majority of our varieties—or the majority of varieties in nectarines have large flowers.

Q. Yes.

A. And, therefore, you can determine to some extent the location of the nectarine orchards through the country.

Q. In other words, that is a small lead as to nectarine orchards? [134]

A. It is one lead.

Q. It is one lead.

A. It doesn't specify nectarines, however. You have peaches also with large flowers.

Q. Yes. You may determine from the air they are large flowers, and find you are looking at peaches?

A. That is right.

Q. How many years have you been doing that?

A. Oh. I have observed before on a limited

(Testimony of James William Taylor.)

scale, year before last, but this last year was the first time to any great extent.

Q. And have you gone to the orchards that you have photographed? Have you gone to them on the ground to verify your observations from the air?

A. Yes; many of them.

Q. And your description then of the block under discussion here in the picture and on the Hagler ranch is they were large flowers?

A. That is right.

Q. All right. Now, moving back to the summer of 1957 when you were on the ground at the trees, did you have occasion to look at the fruit?

A. In '57?

Q. In '57.

A. Right. Yes; there were some fruits left on the trees [135] after the harvest had been apparently completed.

Q. And the sizes of those fruits, could you describe that?

A. The sizes were small, but there was some range within the sizes.

Q. Now, you are familiar with harvesting of trees? A. Yes.

Q. And did it appear to you that these trees were fully harvested, that it was past the harvest season?

A. You always have some scattered fruit left that were either too small at the time of harvesting, or missed.

(Testimony of James William Taylor.)

Q. Yes. But what I am getting at is, the general harvesting had been finished on the trees?

A. That would be my observation. However, some might come in by scavengers.

Q. Now, the fruit that you did see then were the remnants or a small group left on some of the trees? A. Yes.

Q. And of that fruit, did you observe its color?

A. Yes; I observed its color.

Q. Would you describe it?

A. The color, at that time the few fruits that were left were predominantly red with, in some cases in some fruits, yellow portions.

Q. I see. Now, maybe I have touched lightly on this before, but describe it more fully. Would you explain as a [136] general rule the change in colors of a fruit through the season, of a given variety of fruit, what you expect?

A. Your expectations, of course, are green for the beginning of the season. Some of the highly red colored nectarines are of some red portion, have a red portion while they are still green.

Q. Yes.

A. Then as the green base color turns to a yellow base——

Q. Is that because of the yellow fruit or not?

A. That is because of the yellow flesh.

Q. Yes.

A. The yellow fruits, yellow fruit varieties, when turning from the green state to the yellow develop a yellow base color, depending on the cir-

(Testimony of James William Taylor.)

cumstances of its position and the variety, it will develop red over-color at the time it is maturing.

Q. And as it gains maturity and goes into even late maturity, does the color change more, or not?

A. Well, there is, as the fruit is in the stage of developing, developing in relation to maturity——

Q. Yes.

A. ——the red increases as it matures, but there becomes a point of senescence where it starts to go back and the color does—the red color doesn't develop.

Q. I haven't asked you this before, or even beforehand, [137] but did you happen to see any LeGrands on this trip to the Hagler place at that time or not? A. No; not at that time.

Q. Now, then, did you break open the nectarines that you observed on these trees under discussion?

A. Yes; I cut them, cut the nectarines and observed the inside characteristics, as being a free-stone, red around the pit cavity, of firm texture for the time, for the fact it was after the actual harvesting date, and had considerable red at that time.

Q. Of course, the flesh was yellow flesh, I assume?

A. Yes; yellow fleshed with red running into the flesh.

Q. Now, did you observe the skin of the nectarines?

A. Yes; the skin was very smooth, waxy surface.

(Testimony of James William Taylor.)

Q. Did you observe the sweetness or bitterness of the kernel? A. Yes.

Q. Or the taste of it?

A. On cracking I found the kernel to be bitter.

Q. Did you take a bite of them?

A. Yes; I sampled them, as you always do, and the fruit in relation to some of other fruits, most fruits, was slightly acid, slightly acid in taste.

Q. Did it have a good taste or bad taste?

A. Yes; it was a good taste.

Q. Insofar as taste opinion varies. Now, then, you [138] have observed Sun Grand nectarines?

A. Yes; we have a block at the ranch, and see it considerable.

Q. In particular, you have observed the nectarines which you grow under Mr. Anderson's plant patent 974, which we have denoted as Sun Grand?

A. Yes.

Q. And you are familiar with this patent, or have previously read it on occasion?

A. Yes; I have read it on occasion.

Q. So I would like to have you now describe the fruit which is grown on your ranch, or the ranch of your associate, Mr. Anderson, which you are familiar with, and which is grown under this plant patent 974. First, I would like you to describe the trees in the summertime, in July.

A. Well, the trees are of medium growth, and in relation to vigor, taking a leaf as part of the tree, the glands are globose.

Q. Now, as to the fruit on the tree in the sum-

(Testimony of James William Taylor.)

mertime, in July—maybe I am assuming something. Would you describe when the fruit comes on the tree, within some general range?

A. Well, I think the question may be misleading. You mean when the fruit matures, begins to mature, or——

Q. Yes, will you describe when the fruit is mature, or when it begins to mature, or however you want to describe it? [139]

A. The fruit ripens, now speaking of picking, picking ripe or commercial operation for market, the fruit matures about two to three weeks ahead of Albertas.

Q. Alberta?

A. Yes. Or LeGrand, which is the same as Alberta in the ripening period. We speak of LeGrand and Alberta as ripening approximately the same time.

Q. Now, do you happen to remember approximately the time in 1957 when your Sun Grand ripened, as to calendar date, or the ranges as to calendar dates?

A. No; I don't remember offhand, but for an exact date I would have to check records of picking time.

Q. Can you give it in a general range?

A. Approximately 8th and 10th—no; I don't remember for sure. I think the 8th and 10th, but I could be wrong.

Q. Of July? A. Of July, yes.

Q. All right. Now, going back to your descrip-

(Testimony of James William Taylor.)

tion of the Sun Grand, looking at the fruit of the Sun Grand a week or two beyond the medium ripening period, after the harvest is done on your ranch—see what I mean? A. Yes.

Q. And there may be a few fruits still left on the trees overlooked by the pickers, or left there for some reason, see what I mean? [140]

A. Yes.

Q. Now, would you describe that fruit on your Sun Grand trees about that time?

A. Well, you would have a yellow fleshed free-stone, red around the pit cavity with red extending into the flesh. It would, in many cases, be still firm because of the firmness of the variety, the surface being—well, the kernel of the pit would be bitter. Now, taking the fruit from the external view, the surface is extremely smooth, with predominantly red over-coloring, in many cases possibly completely red, but in many cases you would have some yellow portion, but predominantly red.

Q. Now, we were speaking of the taste awhile ago. Would you describe the taste and the content to the mouth of this Sun Grand fruit in your orchard that we have referred to?

A. The quality is good, but it has an acid, somewhat of an acid taste.

Q. Now, then, you have made reference in both the orchard that you examined on Mr. Hagler's ranch and the Sun Grands on your associate's ranch to globose glands, and described them both as having those glands. I want to ask you a general ques-

(Testimony of James William Taylor.)

tion about identification of trees by the number of glands of a given globose, reniform description. Do you have an opinion or is there any—— [141]

A. To my knowledge it is impossible to differentiate between varieties, in relation to the number of glands. The number of glands is variable, and I know of no identification system that uses that, or I have not been able to work it out myself.

Q. Have you made pointed efforts to observe the number of glands to determine the number of glands in your experimental work, to determine if you could develop some rule as to the number of glands being of significance?

A. Yes; upon many occasions when problems occur within our own orchard, within nursery mixtures, I have tried to determine the number of glands.

Q. And have you ever been able to come to any justifiable conclusion to identify by number of glands?

A. I have not.

Q. Now, did Mr. Anderson bring to your attention in the first part of July, this year, some fruit samples?

A. Yes; he brought some fruit samples to me.

Q. And he had certain fruit samples from the L. A. Hagler ranch, or so described to you?

A. He gave me some fruits, that were divided into different groups.

Q. Yes. And about what time was that?

A. Oh, I believe about the 10th or thereabouts of July.

(Testimony of James William Taylor.)

Q. And what did you do with that fruit? [142]

A. I put them in our refrigeration unit, which is in the basement of my house.

Q. And at what temperature did you keep the fruit, approximately?

A. Our temperature ranges from 36 to 38, approximately.

Q. And did you freeze the fruit?

A. No; they were not frozen.

Q. Why didn't you freeze the fruit?

A. Well, when fruit is frozen the use for positive identification loses its value, because of the change in color, and possibly some changes in shape when you remove it from the frozen condition.

Q. Now, then, did you have occasion to take photographs—strike that. Did you have occasion to pick representative samples of Sun Grands under this plant patent 974 from Mr. Anderson's orchard there under your supervision?

A. Yes; at about that time I also collected, or picked a large sample of Sun Grand nectarines.

Q. And did you keep those samples in the same refrigeration as the samples Mr. Anderson had brought you?

A. Yes; I had the boxes adjacent to one another.

Q. Did you keep them separate?

A. Yes.

Q. Now, in September, did you have occasion to take pictures of these fruits? You give me the date.

(Testimony of James William Taylor.)

A. Yes; a good number of them were [143] deteriorating because of the time they had been in storage. It was some two months later, and soft fruit doesn't stand up too long.

Q. You did take pictures?

A. And I took pictures.

Q. Now, did you pick out samples that were in a—well, you tell me what samples you picked out?

A. I selected representative samples of the fruit that was left.

Q. And will you describe in what state of preservation the fruit was that you selected?

A. The exterior condition of the fruit that I selected was excellent, as far as the exterior.

Q. All right.

The Court: Let's have a brief recess while you are showing counsel the pictures.

(A short recess was taken.)

The Court: All right.

Q. (By Mr. Shepard): I show you two photographs, Mr. Taylor, which purport to represent fruit, and one has a label on it, "Sun Grand," and the other has a label on it, "Red King."

A. Yes.

Q. Are you familiar with those photographs?

A. Yes; I am familiar with those photographs.

Q. Will you tell me about what time those [144] photographs were taken?

A. These photographs were taken in the first part of September.

(Testimony of James William Taylor.)

Q. Of this year? A. Of this year.

Q. Now, the photograph that is labeled "Sun Grand" has six fruit in it, is that correct?

A. That is right, there are six fruit.

Q. And what are the six fruits that were photographed there?

A. There were samples—selected samples that represented the Sun Grand, the collection of Sun Grand that I had at that time.

Q. And these were some of the Sun Grand that you had picked earlier in July, and kept in cold storage? A. That is right.

Q. And they had come from Mr. Anderson's ranch there? A. That is right.

Q. Did you, in taking these six fruits there, take and choose specific sizes or different sizes, or will you describe how you selected the sizes?

A. I selected a range in size from the fruit that I had left of the original collected samples.

Q. Do the six samples there represent a representative range of size of those that you had left? [145] A. Yes.

Q. Now, would you describe how the photographs were taken?

A. These photographs were taken with a 35 millimeter camera, with Kodacolor film.

Q. For the record, just a moment. Kodacolor, are you familiar enough to know that is any different from other colored film?

A. Yes. It is a type of film that develops into a negative, and not into a slide.

(Testimony of James William Taylor.)

Q. All right. Go ahead with your description of how they were taken.

A. They were taken with a 35 millimeter camera, set up at the right position, at the distance to suit the picture.

Q. Was the camera on a tripod?

A. No; I had it set up so it was solid, so it wouldn't move, set up at the correct height.

Q. And what was it set on, table, or books, or what?

A. No; where I was taking the pictures I had the height of a post.

Q. A post?

A. A post, that gave me the height.

Q. And where was the fruit with relation to the camera?

A. The fruit was set down on the top of a small made up table that I had.

Q. And approximately how far from the [146] camera?

A. As near as I remember it, three feet, as I remember it.

Q. All right.

A. I would have to go back and measure.

Q. Now, the particular thing, in taking the second picture, labeled "Red King," was that taken at the same time as the one labeled "Sun Grand," or within a few minutes of each other?

A. Yes; it was taken within the same time, in a few minutes, just enough time to change the fruit.

(Testimony of James William Taylor.)

Q. The table that you used, was that covered with a cloth?

A. Yes; it was covered with a black cloth.

Q. And was the same table used for each of those two pictures?

A. Yes; the same setup exactly, except the fruit was moved.

Q. The same cloth was on the table for each picture? A. Right.

Q. And the same thumbtacks?

A. Yes; the pictures should have been masked before they were enlarged.

Q. All right. Now, the label on there, is that a piece of cardboard, or something, laid down there?

A. Yes; just a piece of white paper.

Q. Now, were each of these photographs taken from the [147] same distance? A. Yes.

Q. In other words, was the camera moved between shots, or left in the same place?

A. The camera was moved, but was set back at the same place.

Q. Did you use the same lens aperture?

A. Yes.

Q. Did you use the same speed?

A. Yes; the settings on the camera were the same.

Q. And the same film, of course?

A. Yes.

Q. I suppose it was within the same roll of film? A. Yes.

Q. Now, I would like to have these—well, maybe

(Testimony of James William Taylor.)

I haven't identified the second one yet. The one called Red King there, what fruit is in that picture?

A. The so-called Red King fruit that Mr. Anderson left with me.

Q. And that was the fruit that Mr. Anderson brought from the Hagler ranch?

A. From the Hagler ranch, right.

Q. And did you take representative samples of that fruit to put in this picture?

A. Yes. [148]

Q. Now, those pictures, insofar as they go, do they fairly portray the fruit that was photographed in those pictures? Did you get my question?

A. No; I didn't.

The Court: Are they a correct representation of the fruit?

A. Oh, yes; it is representative of the sample.

Q. (By Mr. Shepard): No, I am not asking that. Do the pictures fairly portray the fruit that you took pictures of?

A. Oh, yes; the pictures portray the fruit as they were, yes.

Mr. Shepard: I will ask they be introduced.

The Court: All right. Then the one you spoke of first——

Mr. Shepard: That is the Sun Grand.

The Court: ——that will be received as——

The Clerk: Plaintiff's Exhibit 5.

The Court: ——5, and this one will be marked as 6.

(Testimony of James William Taylor.)

Mr. Shepard: Just let me write those down, your Honor.

(The pictures referred to were marked as Plaintiff's Exhibits 5 and 6, respectively, and were received in evidence.)

Q. (By Mr. Shepard): Now, the fruit that is grown under plant patent 974, the Sun Grand, would you describe the suture, representative suture line on those two? [149]

A. The suture ventral, meaning suture where the lips of the fruit come together, is slightly suppressed, especially towards the apex.

Q. Does it go beyond the apex?

A. Yes, it goes beyond the apex, in most cases beyond. In discussing the suture, you have a range again within different fruits, in that the suture will be slightly more suppressed, slightly longer, slightly beyond the apex.

Q. And the suture description, is that what you classify as qualitative or quantitative difference?

A. It is a quantitative difference, and is variable with its depth.

Q. Now, the accused fruit which you saw at the Hagler ranch in the summer of 1957, will you describe the suture line as you recall it on that fruit?

A. The suture, as I recall it, was the same as that of the Sun Grand.

Q. As you have previously described?

A. As I previously described as to the Sun Grand.

(Testimony of James William Taylor.)

Q. Now, with reference to the apex, which is apparently used in some descriptions, is that a quantitative or qualitative characteristic?

A. The apex is a quantitative characteristic, which varies within a range of fruit from a said variety.

Q. Now, as to the Sun Grand, would you describe as best [150] you can, the range of the apex characteristic in the Sun Grand?

A. The apex varies from being flat, or nearly so, to protrusions, a small point, or a point.

Q. In other words, on some Sun Grands the apex would be almost flat, you wouldn't see any point? A. That is right.

Q. On other Sun Grands you might see a small point on the apex?

A. Yes, it can be quite a little point.

Q. All right. Now, will you describe the apex you saw on the accused fruit at the Hagler ranch in 1957, as you recall?

A. As I recall, the range would be somewhat—would be the same; there would be some flat to a slight—

Q. Did you see a point on some of them?

A. Well, there would be points, not large points, but small, protruding points.

Q. What is that point? Is that the residual of some earlier stage on the fruit?

A. Yes, the piece of—there is a little hair piece that hangs on the end, if the fruit has not been particularly disturbed, which is part of the style,

(Testimony of James William Taylor.)

which is part of the pistil, the long part of the pistil, and that part dries up in the center of the flower which develops into the fruit, [151] the extended portion is the style.

Q. On some of the fruit there is a slight remnant or trace of that pistil point there, is that it?

A. Oh, I don't remember, but in most fruits you can find it upon occasion. I don't remember though.

Mr. Griswold: What was that last answer? I don't remember what?

The Witness: I don't remember from a year ago seeing the fragment on the end.

Mr. Griswold: Were you speaking about the Hagler fruit?

Q. (By Mr. Shepard): You were speaking of the Hagler fruit?

A. Well, the question——

Mr. Shepard: Maybe we better go back again. Would you read the question?

(Record read.)

A. That was a sort of statement there, but I believe the question was on that same basis.

Q. (By Mr. Shepard): What I started to ask you, to start all over again, was whether or not this pistil or flower which you said ultimately is the spot where the apex on the fruit develops, some of the fruit have a small point, and whether you might say that is a slight remnant or clue to the pistil that used to be there? [152]

A. Well, I am not referring to the point in that

(Testimony of James William Taylor.)

particular assertion; I am referring to a little thread-like bit of dried material that sometimes hangs onto the fruit.

Q. Oh, I see. All right.

A. Not to the point of the apex.

Q. All right. Now, referring to the photographs in front of you, Exhibit 5 being the Sun Grand and Exhibit 6 being the Red King, do you find an apex with a point on either of the fruit, or among the fruit of the two photographs?

A. I find some fruits with points.

Q. Would you describe that, or point it out?

A. Well, for instance in this picture here you have a small point.

Q. You are referring to——

A. I am referring to the Sun Grand. You have a small point there (indicating).

Q. And what fruit is that in the picture, the upper?

A. The upper middle, upper center.

Q. Upper center. And likewise in the Red King do you find points of the apex, or not?

A. Yes, there are points in the right lower, there is certainly a point.

Q. And do you find other fruit with what you call flat apexes?

A. Well, the apexes that aren't protruding, essentially [153] flat, you have the lower right in the Sun Grand.

Q. Picture?

A. Picture, right. Fruit in the lower right of

(Testimony of James William Taylor.)

the Sun Grand picture. In the lower left there is very little, if any.

Q. And you are referring to the Red King?

A. To the one called Red King, at the bottom.

Q. Now, one final word about the fruit in those pictures. You said they were representative. However, among the Sun Grand, would you expect to find extremes of sizes not shown in those pictures?

A. Oh, yes. You find extremes of sizes according to cultural conditions which can make an abnormally large or an abnormally small fruit.

Q. Are there Sun Grands that are smaller than those shown in the picture? A. Right.

Q. And are there Sun Grands that are larger?

A. Yes.

Q. And likewise as to the Red Kings that you saw in 1957, and also among the fruit that Mr. Anderson left with you, the samples, were there smaller fruit?

A. Yes, there were smaller fruit.

Q. And larger fruit?

A. And larger fruit, yes. [154]

Mr. Shepard: I think that is all the questions. You may cross-examine.

The Court: Go ahead, I want to finish with this witness. We are moving very, very slowly, gentlemen.

Cross-Examination

By Mr. Houk:

Q. Mr. Taylor, according to your testimony,

(Testimony of James William Taylor.)

then you have been with Mr. Anderson since 1953?

A. That is correct.

Q. And you did this type of work then for a period of approximately four or five years?

A. What do you speak of, "this type of work"?

Q. That you are in right now, the work you have been doing for Mr. Anderson?

A. In the exact job.

Q. Have you been doing other work here?

A. No.

Q. Then this is the type of work you have been doing for the past four or five years?

A. Yes.

Q. Now, how long have you been taking aerial photographs?

A. Well, my first experience, extensive experience, was in Hawaii. We used the aerial photographs in our complete fertilization on a plantation I was on.

Q. How long have you been taking pictures of blossoms [155] by aerial photography?

A. This is the first year I have taken them extensively.

Q. Is that the general way of ascertaining the type of trees, or the type of blossoms?

A. No, sir.

Q. You made the statement that you had written a report and also a paper, and there was a report that was printed on peaches and nectarines, is that correct?

(Testimony of James William Taylor.)

A. They were both in relation to peaches and nectarines.

Q. Yes. Well, which one was it that you said—oh, they were both? A. Yes.

Q. One was a paper and one was a report, is that correct?

A. Well, yes, they were both—depending on the definition of “paper.”

Q. I see. It was the second one you mentioned that I am interested in. Where was that published?

A. It is the Pomology Association of America, Oregon, the Horticultural Variety Digest.

Q. And do you know what issue it was in?

A. The recent issue.

Q. And you do know which one it was, the date or the number?

A. No, I don't offhand. I would have to check the number. It is an irregular publication, and I am not sure how many [156] were published this year.

Q. Do you know how often they come out?

A. It is not a—they try to bring out so many a year, but it is irregular.

Q. It was in a recent issue?

A. In the recent issue.

Q. Yes. Prior to your entering into the employment of Mr. Anderson, did you have any knowledge of any kind whatsoever regarding the plant patent 974, which we call the Sun Grand?

A. No, sir.

Q. Now, these particular examinations that you

(Testimony of James William Taylor.)

made to ascertain the things you have testified to, do they consist of each and everything that you did? Is there anything else that you can think of that you did?

A. Well, I have a normal routine in observing varieties and working with a variety, and this was a variety I was observing, and as my memory goes here that was the way, or those were the things that I observed. However, I look at all the things.

Q. Is there anything else that you did that you can remember that you have not testified to here today?

A. Not that I remember.

Q. Did you make all the measurable characteristics that you felt were necessary? [157]

A. I didn't make any measurements, actual measurements in inches or centimeters, because measurements in inches and centimeters are misleading in a case such as this.

Q. You did not make any measurements?

A. No, I did not.

Q. When did you make this aerial trip, or this trip that you took this aerial photography work over Mr. Hagler's ranch?

A. Oh, approximately the first week of March, I don't remember the exact date.

Q. What time of day did you go?

A. Oh, I don't remember the exact time. We started some time in the morning, as far as I remember, and made the flight. I don't remember. It was one series of pictures out of many.

(Testimony of James William Taylor.)

Q. Well, do you remember what time you took the picture?

A. I would have to check back on that.

The Court: Was it the morning or the afternoon? It is not so far away that you wouldn't remember.

The Witness: As far as I remember it was in the morning.

Q. (By Mr. Houk): It was in the morning?

A. Yes.

Q. Do you know what kind of weather there was?

A. Oh, as I remember, there were some [158] clouds.

Q. Was the sun shining at the time you took the picture?

A. Well, there was sun shining. Where you have clouds you have intervals of sun.

Q. Was there any sun shining at the time you took the picture? A. Yes.

Q. And which way did you take the picture? Which way were you traveling when the picture was taken?

A. Well, there were a number of pictures, and they were taken from different——

Q. I am talking about the picture you took of this orchard.

A. It was taken from the west, as I remember.

Q. Mr. Taylor, that is the only picture I am going to be talking about. A. Excuse me.

Q. Now, when you took that picture, the one

(Testimony of James William Taylor.)

you have testified to, which way was the plane going?

Mr. Shepard: Maybe we better get the picture out.

The Court: That is all right, he remembers it. Go ahead. Can you tell? You want to look at the picture? All right, Mr. Eiland, show the picture to the witness.

A. I think the plane was going north, as I remember, although I could be wrong on that, because of the—no, it was the one before. As I remember it, we were coming from the [159] south, going north, but that is memory at this point.

Q. (By Mr. Houk): Well, have you any other method than memory to determine which way you were going? A. No, sir.

Q. Did you make a note on this trip that you made, as to the date you went?

A. Yes, I have notes.

Q. Do you have notes as to which way your plane was going?

A. No, I don't believe so.

Q. Well, when you were down there, at the time you went down and were on the property—withdraw that question. When you took this picture, and you looked down and looked at the blossoms, how big a spot of blossoms did you see, as near as you can remember the size?

A. Well, when you look out an airplane window you have a broad area, you don't have a—you see a great expanse of area of many blocks.

(Testimony of James William Taylor.)

Q. How big was the block of blossoms you were interested in taking a picture of?

A. It's the—observation from the air, I would say, oh, roughly, ten acres, but it is an estimation. From the picture you can count the tree numbers if you want.

Q. These blossoms that you took a picture of, were there [160] more than one kind of blossoms?

A. Well, as I remember, there was this particular block—not this particular block, but there was an arrangement of area that was pink, pink in color, and the general aspect of the area gives the effect of a pink over-all color.

Q. Well, was there more than one color, or just one color?

A. Well, as far as looking at it from—in that particular block—are you speaking now of the particular block?

Q. I am speaking of the blossoms that are shown in the picture that you took.

A. Let's verify that.

Q. You show me the blossoms there that you were going to take a picture of.

A. Well, I was taking a general picture across this area of the landscape.

Q. All right. Now, you point out to me then in this picture where the blossoms are?

A. Well, this block here would be of the pink type, and this block here.

Q. All right. Now, these would all be pink?

(Testimony of James William Taylor.)

A. Right.

Q. Referring to the—were there any other blossoms in this immediate vicinity, we will say?

A. Well, I don't remember at this time, just what else [161] there was at this time.

Q. Well, then, how did you pick out this particular block that you mentioned were of large size?

A. Because of the characteristics in comparison to other blossoms I know of in large flowers.

Q. Were there any other blossoms near there different than those you saw?

A. I don't remember at this time what else there was.

Q. You don't remember what else was there?

The Court: You keep repeating the answer, and the witness doesn't know whether it is a new question, or what. We all fall into that habit.

Q. (By Mr. Houk): Mr. Taylor, when you looked at the trees and examined the glands, did you count the glands on the leaves of any of the trees of Mr. Hagler?

A. Upon looking at glands, I look at the ones that are most protruded, or the larger glands, to give the type I am hunting for. Then, of course, I scan at the same time the number of glands.

Q. Did you count them?

A. I don't remember doing so particularly, because so far as I know the number of glands does not—isn't a reliable characteristic between varieties.

Q. My Taylor, how many kinds of nectarines

(Testimony of James William Taylor.)

have large [162] flowers? Would you estimate that for us?

A. Oh, the large proportion of the varieties have large flowers.

Q. And the others have small or medium?

A. Small and medium, depending on variety.

Q. At that time when you were there did you take any fruit with you?

A. I did not take any fruit with me.

Q. Did anybody else, as far as you know?

A. I don't remember.

Q. When you were down there this time making this examination, did you make any notes or record this trip of any kind?

A. I believe that I did.

Q. And do you know where they are?

A. I would have to go back and check. I am not sure.

Q. You don't have any of them with you?

A. I do not have any with me.

Q. These pictures that you have testified to, Sun Grand and Red King, that were taken by you, how many Red King fruit did you have when you first got the fruit?

A. I didn't count them exactly.

Q. How many would you say? Could you estimate it for us, how many you had?

A. Oh, they were set into baskets, into three flats. [163]

The Court: I didn't hear the answer.

The Witness: Oh, I would guess 60 to 70 fruits,

(Testimony of James William Taylor.)

although that is very approximate, because it could be more, or less.

The Court: Where were they, in boxes or baskets?

The Witness: In baskets in a box.

Q. (By Mr. Houk): How many did you have left after you picked out the ones that you took the picture of?

The Court: He said he doesn't know. What have you got on the picture, six?

The Witness: Yes.

The Court: He doesn't remember the exact amount.

Mr. Houk: Well, if the Court please, I asked how many were left when he got through, whether he used the last six of the fruit.

The Court: No, he said he picked six with the characteristics, isn't that what you said?

The Witness: Yes, sir.

The Court: Well, do you remember how many there were left?

The Witness: There were several left; I didn't count them.

The Court: I see; all right.

Q. (By Mr. Houk): How many Sun Grands did you have to begin with?

A. I had a lug box, field lug box. [164]

Q. And were most of those gone before you picked these out? A. Yes.

Q. That you selected?

A. There were a number of those decayed.

(Testimony of James William Taylor.)

Q. So of the few left when you got through, you discarded those after you picked out the ones you wanted?

A. There was a proportion of those left also.

Q. When did you get this fruit? When did you get the Red King fruit? Approximately?

A. The Red King fruit, as I remember it, the first part of July, about July the 10th.

Q. And the Sun Grand?

A. I picked them shortly thereafter.

Q. And where did you get them from, from what locality?

A. Mr. Anderson's block at LeGrand.

Q. At LeGrand? A. Yes.

Mr. Shepard: I want to interject, if I may. I inadvertently forgot to introduce two photographs of fruit, which I would like to, because they were done by a different photographer and I don't want Mr. Houk to think that I intentionally left these out, in his cross-examination. I completely forgot about these other photographs here.

The Court: Did he take them? [165]

Mr. Shepard: No, they were taken by another photographer when he was present, your Honor, in his presence.

The Court: Well, unless either side wants them in, I don't see the purpose.

Mr. Shepard: Well, I do want to put them——

The Court: Well, you can do that.

Mr. Shepard: ——and I just didn't want Mr. Houk to be misled.

(Testimony of James William Taylor.)

The Court: You can do that on redirect.

Mr. Shepard: Yes, thank you.

Q. (By Mr. Houk): Mr. Taylor, I think in your testimony you stated that if one type of fruit is grown in different areas it would probably come out somewhat different, is that correct?

A. Yes, there are variations within area, within particular varieties grown in different areas.

Q. Is there much variation between this place where Mr. Anderson grew his Sun Grand fruit, and we will say the south part of the Valley here?

A. No.

Q. There would be no variation there at all?

A. Oh, no great variation. There will be a variation within two blocks that are adjacent under different cultural practices right adjacent, so you do have very small, minute variations. [166]

Q. Well, then, there isn't much variation, is that correct, in areas between nectarines, one grown in LeGrand and one in Tulare County? There wouldn't be much variation, is that correct?

A. It all depends upon, if there is—in qualitative characteristics there isn't.

The Court: In the characteristics of the fruit.

The Witness: In qualitative characteristics of the fruit there aren't differences, great differences, but in quantitative characteristics there are some.

The Court: Depending on the soil or the climate?

The Witness: Depending on the soil, the climate, the position within the tree of the fruit, the pruning, the thinning, all have effects on the fruit.

(Testimony of James William Taylor.)

The Court: I see. That is true of all fruit grown in semi-tropical areas?

The Witness: Yes, it is true of all fruits.

The Court: They grow by irrigation. These are irrigated?

The Witness: That is right.

The Court: All right. Anything further?

Mr. Houk: Just a couple more questions.

Q. Mr. Taylor, isn't it true that if fruit is grown in other localities it is very likely there would be some characteristics that would be different?

A. Yes. We might take the length of a fruit variety as you go south, taking great [167] distances.

Q. And one of the best ways to determine the type of fruit, and so forth, is to have the fruit in different stages to examine and test, isn't that right?

A. Well, a fruit is a fruit, if the stage is comparable, if the factors are comparable.

Q. It wouldn't make any difference when you examined it? A. Did I?

Q. No; I am asking you, would it make any difference if you examined the fruit just once, or whether if you could follow the fruit through its process of growing and ripening you could test it then, or if one examination would be sufficient?

A. Well, on a general—on the specific qualitative characteristics one examination is sufficient. On the quantitative characteristics certain of them

(Testimony of James William Taylor.)

would be obvious throughout the ripening period, throughout the period. Certain of them change slightly from the green coloring to the senescent period.

A. Are there any other pictures that you have taken, other than those shown there of the fruit, that you took yourself?

A. I don't have any here.

Q. Well, are there any that you did take at any other time?

A. Well, any photographer, as you are taking a picture, [168] you bracket high and bracket lower in case you are off on your lighting.

Q. Well, did you take any other pictures——

A. That is what I said.

Q. ——other than the pictures there?

A. Yes; I took other pictures.

Q. All right, when did you take them?

A. At the same time.

Q. That's what I wanted to get at. Were there any other times that you took any pictures?

A. No.

Q. All the pictures were taken at the same time? A. Yes.

Q. Now, were there any other pictures, other than these, taken by any other person when you were present?

A. Those are the only ones—excuse me. There was one other four by five which hasn't come back from the color people, but——

Q. That was taken when?

(Testimony of James William Taylor.)

A. At the same time.

Q. As this?

A. Yes; said group, at the same time.

Q. And the same photographer?

A. Yes.

Q. Now, you mentioned you took some notes?
Do you [169] have those notes available?

A. Which ones?

Q. Of any of this—any of these examinations?

The Court: He has not used them to refresh his recollection, therefore, you are not entitled to see them.

Mr. Houk: Well, we would like to ask him to bring them to court.

The Court: I am not going to allow him to do that. He is not using them to refresh his recollection, therefore, you are not entitled to see them.

Mr. Houk: Very well.

The Court: If he had used them to refresh his recollection, you might see them, but so long as he does not those are his property and you have no right to look at them.

Mr. Houk: We have no further questions.

Mr. Shepard: May I take time to introduce these?

The Court: Yes.

Redirect Examination

By Mr. Shepard:

Q. Mr. Taylor, I overlooked the photographs I place before you now, which you gave me the nega-

(Testimony of James William Taylor.)

tive of a couple of days ago, last week. The pictures you have there now were taken where?

A. They were taken in a studio in Merced.

Q. In relation to time, do you remember the same day or [170] different days as Exhibits 5 and 6?

A. The same day.

Q. The same day you took Exhibits 5 and 6?

A. Yes.

Q. You live in LeGrand, a short distance from Merced?

A. That's right.

Q. And the same day you took samples into a commercial photographer?

A. Commercial photographer.

Q. And without going through all the details again, did you take the same type of representative samples from the remaining good fruit of Sun Grand and the accused variety?

A. Yes; I took——

Q. Now, were you present when these two photographs were taken?

A. Yes; I placed the fruit in position on their table.

Q. And do you know what kind of camera was used?

A. Yes; these were taken with a 35 millimeter camera also.

Q. And how was that camera placed?

A. It was on a tripod set facing down onto it.

Q. To the table?

A. To a low table, yes.

(Testimony of James William Taylor.)

Q. And the background of the table in these pictures is what? [171]

A. It is cardboard, heavy cardboard.

Q. And again, do you have any better memory as to the approximate distance of the camera from the subject on the tripod?

A. No; I think a little farther away, as I remember, but I don't remember, about four feet.

Q. Did you observe the camera in each of the photographs as to setting of time, speed, aperture, and so forth?

A. Yes; for these the camera wasn't changed as it was set.

Q. No; I am talking about the speeds of the lens, the aperture of the lens, and the magnification distance.

A. Yes; the timing, the distance was standard, because it was set on a tripod, the camera was on a tripod.

Q. Were all of those factors the same to your observation of the camera in each of these photographs? A. Yes.

Q. And the fruit was placed on the same table, and in as much the same location as humanly possible? A. Yes; I placed it there.

Q. And did those pictures, with their different white backgrounds fairly portray the fruit which was photographed in those pictures?

A. Yes.

Q. And specifically, the one labelled Sun Grand

(Testimony of James William Taylor.)

is the [172] fruit which came from Mr. Anderson's orchard and which was in the refrigerator for a couple of months, is that right? A. Yes.

Q. And the one labelled Red King is the accused fruit which Mr. Anderson brought you samples of on about July 10th and which you kept in the refrigerator for a like period?

A. Right, and the purpose of the photograph—this is super Ansco type of film.

Q. Oh, yes, the type of film——

A. It is a different type of film.

Q. And has a slightly different color variation, or not?

A. Well, yes, there is a slight different color variation there.

Q. Is it true that color photography is not necessarily an exact duplicate replica of the color tones as they appear to the human eye?

A. That's right.

Q. It is as close as the commercial laboratories can get, but there is a variance between films?

A. It is variable between films.

Mr. Shepard: I would like to introduce those photographs.

The Court: All right, they may be received. Let's put them in the same order, the Sun Grand will be 7, and the other will be 8.

(The photographs referred to were marked as Plaintiff's Exhibits 7 and 8, respectively, and were received in evidence.) [173]

(Testimony of James William Taylor.)

Mr. Shepard: Thank you, your Honor.

The Court: All right, anything further?

Mr. Shepard: No, your Honor.

Mr. Houk: We would like to ask one or two questions, your Honor.

The Court: Go ahead. Make it one or two. Gentlemen, I don't want to crowd you, but we must move a little faster. I don't know how many experts they have but if we take one day with each expert, we are going to take what, in my opinion, is an unnecessarily long time to present the evidence in this case. I can enjoy leisure myself but this is a very fast moving court, there are cases behind you. That is why I am not looking at the clock and I want you to finish with this witness. Go ahead.

Recross-Examination

By Mr. Houk:

Q. Mr. Taylor, this was taken of the same fruit that you took in the other picture? Is that correct?

A. The samples are from the same fruit.

The Court: No; it wasn't the same fruit.

The Witness: No; it was——

The Court: It was different fruit.

The Witness: The fruit I took into Merced broke down before I was able to use it.

The Court: Yes. No, no, it wasn't the same fruit; it [174] was from the same batch, is that true?

(Testimony of James William Taylor.)

The Witness: Yes; that is right, the same batch.

The Court: And you took different samples?

The Witness: That is right, because they broke down.

The Court: Yes. All right.

Q. (By Mr. Houk): Now, if you were asked to make a designation, or to pick out a fruit to designate the type of fruit, would you be willing to base that on just a picture like that that you have there? If I presented you a picture of a different type of nectarine just like that, would you feel that would be sufficient for you to make a designation of it? A. No; I do not.

Mr. Houk: That is all.

The Court: All right; 2:00 o'clock.

(Thereupon, at 12:30 p.m. a recess was taken to 2:00 p.m. of the same day.) [175]

Afternoon Session—2:00 P.M.

The Court: All right, gentlemen.

Mr. Shepard: We will call Mr. Howard Stafford.

HOWARD STAFFORD

called as a witness by plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Howard Brown Stafford.

Direct Examination

By Mr. Shepard:

Q. Mr. Stafford, where do you live?

(Testimony of Howard Stafford.)

A. 3922 North Fruit Avenue, Fresno, California.

Q. Mr. Stafford, what is your business or occupation?

A. I am a nurseryman. I manage the Reedley Nursery, Incorporated, Reedley, California.

Q. Is that also known as Kim Brothers?

A. That is right; it is, part of the Kim Brothers organization.

Q. Yes. And how long have you been the manager of the nursery part of the Kim organization?

A. Something like 12 years.

Q. Now, as part of the nursery business do you sell patented varieties of nectarines?

A. I do. [176]

Q. And particularly I draw your attention to plant patent 974, in evidence here, which has been referred to as Sun Grand nectarine. Have you supervised and as the years have gone by overseen the sales of Sun Grand nectarine trees?

A. I have.

Q. The Sun Grand nectarine, plant patent 974, when was the first time that was sold as a commercial product to the nursery, approximately?

A. Approximately during the 1950-51 season, as I remember it.

Q. And then has the nursery stock of the Sun Grand nectarine been sold by your organization in the following years? A. It has.

Q. And during such time that you have sold

(Testimony of Howard Stafford.)

the nectarine in question to the public, has it been labeled with the patent number?

A. It has. It has been labeled with the name, the patent number, and a warning about asexual dissemination.

Q. Now, particularly within the last recent years, the last three or four years, would you describe generally the amount of your Sun Grand nectarine sales, how much or how popular?

A. Well, I can't give it to you in figures here, because [177] I do not have them, but it is one of the main varieties that we have, one of the best sellers. It is considered by the trade to be one of the best commercial varieties of nectarines.

Q. In recent years have your sales grown, or stayed the same, or diminished, or would you care to state in that regard?

A. Well, I will have to say that the last two years have not been as good as it was—I am including the coming year—have not been quite as well in all nursery production as the two seasons ago, but in proportion to the amount of sales of other varieties the Sun Grand still is up among the top in regard to sales.

The Court: Do you know in a good year what the sales amount to, in a general way?

The Witness: Oh, this is a general statement; in our best years we probably sold as many as 25,000 trees of Sun Grand.

The Court: And what is the price at which they sell?

(Testimony of Howard Stafford.)

The Witness: Three dollars each.

The Court: And how old is the tree when you sell it?

The Witness: The tree that we sell is a June Bud which takes us a matter of a little less than a year to develop from seed. In other words, the seed is planted in the spring or the preceding fall, but generally we use spring [178] plant, and it is budded during the months of May and June, the bud forced out, and the tree grown until the following winter, until the dormant period, when we dig the tree and deliver it to the customer.

Mr. Shepard: That is all the questions I have. You may cross-examine.

Cross-Examination

By Mr. Griswold:

Q. Do you know when you first got the Sun Grand tree from Mr. Anderson?

A. Well, as I stated in my statement, as I remember, the first sale of trees was during the 1950-51 season, which would necessarily mean that we probably got buds during the summer of 1950. That could be one year later, I am not positive, but that is as near as I remember.

Q. Did you get a tree from Mr. Anderson, or a bud? A. A bud one.

Q. Now, you have a record of all of the sales that you made of the plant 974? A. We do.

Q. And you have checked your records, have

(Testimony of Howard Stafford.)

you not, for the purpose of deposition, of this trial, as far as sales of Sun Grand? A. To who?

Q. Well, particularly to the defendant, L. A. Hagler. [179] A. I did.

Q. And what did your records disclose as far as sales to L. A. Hagler?

A. Of Sun Grand, none.

Q. At no time? A. At no time.

Q. That is, of course, plant patent 974?

A. That is right.

Q. You are acquainted with Hunter brothers, are you not? A. I am.

Q. Their ranch, for purposes of identification, is near the Hagler ranch?

A. That is right, east of the Hagler ranch.

Q. What does your record show as far as sales to the Hunter brothers of plant 974?

A. No sales of Sun Grand to Mr. Hunter, or the Hunter brothers.

Q. Do you know George Kozuki?

A. George Kozuki, I do.

Q. Do you know whether or not you have made sales of Sun Grand to him?

A. I could not recall at this time.

Q. Can you check your records and report tomorrow morning? A. I can.

Mr. Shepard: How do you spell that name, counsel? [180]

Mr. Griswold: K-o-z-u-k-i.

Q. And do you know Harry Hiraoka?

(Testimony of Howard Stafford.)

A. Hiraoka, I do.

Q. Do you know whether you sold any plant 974 to him?

A. I would still have to check my records on that.

Q. And will you do that and have the records available tomorrow morning?

A. Yes.

Mr. Griswold: Thank you.

Redirect Examination

By Mr. Shepard:

Q. One other question, Mr. Stafford. Apparently it goes without saying, but for the record, do you show any license to the defendant, L. A. Hagler, to reproduce or grow Sun Grand nectarines, plant patent 974?

A. We do not.

Q. And you people have the exclusive patent? You have obtained the exclusive patent rights on that?

A. That is right.

Mr. Shepard: Thank you. That is all.

The Court: All right, Mr. Stafford, step down. Call your next witness.

Mr. Shepard: I would like only one other question. We propose to call Mr. Hagler—perhaps we could do it by stipulation—simply to ask Mr. Hagler if he has sold and [181] shipped fruit from the block in question here. I don't intend to go into the amount.

Mr. Griswold: Well, we can stipulate that we

have sold fruit from trees which we call Red King, under our patent which we will introduce, we have shipped, and under the designation——

The Court: He is not asking you to commit yourself to anything except the fact that shipments were made.

Mr. Griswold: Can I see the photograph in evidence?

Mr. Shepard: Yes.

Mr. Griswold: I think maybe you better question the witness, Mr. Shepard.

Mr. Shepard: We will call Mr. Hagler under 43(b).

The Court: All right.

LYLE ADRIAN HAGLER

called as a witness by the plaintiff under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, having been first duly sworn, was examined and testified as follows:

The Clerk: State your full name, please.

The Witness: Lyle Adrian Hagler.

Direct Examination

By Mr. Shepard:

Q. Mr. Hagler, you are the owner of a ranch in Tulare County? A. Yes, sir. [182]

Q. And on that ranch you have different varieties of fruit trees? A. Yes, sir.

Q. Where is the ranch located?

(Testimony of Lyle Adrian Hagler.)

A. Well, about eight miles west of Visalia, and a mile south, Road 68 off 198.

Q. The photograph which was just displayed to you, Plaintiff's Exhibit 4—

A. I didn't quite understand this.

Q. Let me explain what has been testified to.

A. Yes.

Q. The horizontal line at the bottom of the photograph has been indicated as a fence line, that has power poles along there.

A. This is west?

Q. West is the bottom of the picture.

A. This way, yes.

Q. This blue line is the drainage canal that runs east and west? A. Yes.

Q. And the horizontal line in the middle of the picture indicates an avenue down through the trees, or a breaking point?

A. According to that this would be north, then.

Q. Yes; to the left side of the picture is north, as I understand it, and the far background is in the east. [183]

A. And this canal here?

Q. Sir, that wasn't testified to, and I don't know what that is there.

A. It don't look just right, but I don't hardly follow this picture.

Q. Let me ask you, the road in front of your ranch house runs north and south?

A. Yes, sir.

(Testimony of Lyle Adrian Hagler.)

Q. And going down that road—what is the name of that road? A. Road 68.

Q. And going down that road to the south from your ranch house, what is the next cross road?

A. Well, I call it Caldwell Avenue. They have a different number, but I don't know the number.

Q. On the next road south there, if you were to turn to the right, about a half a mile, you would reach a portion of your ranch? A. Yes, sir.

Q. And if you were to keep on to the right until the first cross street coming up from the south that abuts into Caldwell Avenue and dead-ends there—— A. Yes.

Q. And an extension of that road to the north there is a fence line with telephone poles [184] along? A. Yes.

Q. Going up that fence line some distance you would come to a drainage canal, or a canal there?

A. Yes, sir.

Q. And you have a block of fruit trees which ends at the northern boundary of the canal?

A. That is right.

Q. And the western boundary, these power poles? A. That is right.

Q. Now, directly in the corner of that boundary line and up adjacent to the canal you have one row of trees which I believe you denote as Gold Kings? A. Yes, sir.

Q. And then you have immediately after the row of Gold Kings an additional block, approximately 22 rows, of another variety?

(Testimony of Lyle Adrian Hagler.)

A. I believe it is. I have forgotten now the exact number.

Q. And you call those Red Kings?

A. Yes, sir.

Q. And those in number, do you remember the number, approximately of those?

A. I believe I counted 968 trees.

Q. Yes. Now, in that block of trees, sir, this summer Mr. Anderson and Mr. Savage and Mr. Houk and yourself, in [185] the first days of July, went to take some samples. Do you recall that?

A. Yes, we did.

Q. I don't know whether you took any, but you permitted Mr. Anderson and Mr. Savage to take some samples?

A. Yes, we kept a tree for them, when we were picking we kept a separate tree so they could get a good sample.

Q. Now, in addition to those blocks of 968 trees, there are about five more rows, sir, immediately to the south which are younger Red Kings?

A. Yes.

Q. Just grafted in the winter of 1956-57, I believe?

A. No, February, '57, I believe.

Q. February, '57. Now, the larger block of 968 trees, you harvested when for the first time?

A. Well, the first harvest that we kept a record of all of them was in '57; we had a few in '56, but scattered.

Q. Right. Did you ship under the name of Red King in '56, or do you recall?

(Testimony of Lyle Adrian Hagler.)

A. I don't recall. I don't believe I did. I am not sure.

Q. In any event, in 1957 you did ship some quantity of Red Kings from that block I have just described?

A. Yes, sir.

Q. And again in 1958?

A. Yes, sir. [186]

Q. Without holding you to the detail, Mr. Hagler, of the exact number of tons, could you give us just a general approximation, and you can correct it later?

A. Well, in '57 it was just a little over 4,000; I have forgotten exactly.

Q. 4,000 lugs?

A. Yes, sir, and '58 was a little better than 4,200.

Mr. Shepard: That is all the questions we have, your Honor.

Mr. Griswold: No questions at this time.

The Court: All right; step down, Mr. Hagler.

Mr. Shepard: Now, your Honor, the plaintiff rests.

The Court: All right, call your first witness.

Mr. Griswold: We will call Mr. Kim.

The Court: Are you calling him as an adverse witness?

Mr. Griswold: Yes.

The Court: You must designate, because the record must show. All right.

HYENG (HARRY) S. KIM

the plaintiff, called as a witness by the defendant under the provisions of Section 43(b) of the Federal Rules of Civil Procedure, being first duly sworn, testified as follows:

The Clerk: Just state your full name, please.

The Witness: Hyeng S. Kim, Harry S. Kim, you know.

The Clerk: Have that seat there. [187]

Direct Examination

By Mr. Griswold:

Q. Your address, Mr. Kim? Where do you live?

A. I live in Reedley.

Q. And you are one of the partners of Kim Brothers, who brought this lawsuit?

A. That is right.

Q. And you are acquainted with Lyle Hagler, who was just on the witness stand?

The Court: Answer audibly.

A. I didn't hear.

Mr. Shepard: He said he didn't hear the question.

Q. (By Mr. Griswold): You are acquainted with Mr. Lyle Hagler, who was just on the witness stand?

The Court: Are you hard of hearing, Mr. Kim?

The Witness: Well, my hearing is very poor, you know.

The Court: Your hearing is poor. Well, all right, we will have counsel come closer.

(Testimony of Hyeng (Harry) S. Kim.)

Q. (By Mr. Griswold): You are acquainted with Mr. Hagler, Mr. Lyle Hagler?

A. Yes.

Q. And directing your attention to 1954, did you talk with Mr. Hagler about a new variety of nectarine that he claimed to have? [188]

A. Yes.

Q. Where did you and Mr. Hagler ever discuss that matter?

A. He came to my office and he show the nectarine.

Q. Where was your office?

A. My office is at 7th and I Streets.

The Court: Reedley?

Q. (By Mr. Griswold): In Reedley?

A. Yes, in Reedley.

Q. Who was there when you and Mr. Hagler talked?

A. Nobody was there except Mr. Hagler.

Q. Do you remember when in 1954?

A. I couldn't remember the date, you know, when it was.

Q. Well, was it wintertime or summertime?

A. I think it was about summertime, I believe.

Q. And am I correct that Mr. Hagler had something with him? A. Yes.

Q. What did he have?

A. Oh, he had some kind of new fruit, you know, he call and say very hard to identify at that time, you know; the size was small and fruit, you know, so he showed me that fruit.

(Testimony of Hyeng (Harry) S. Kim.)

Q. What did he tell you about the fruit?

A. He didn't tell me. He just show me the fruit, [189] what kind—what is my idea of what kind of variety.

Q. Didn't he tell you, to refresh your memory, that he had found a sport growth in the LeGrand orchard?

A. No, he didn't mention that. He says it is a new variety.

Q. And what did you say?

A. Well, he said that, you know; I can't deny it.

Q. Didn't you claim that it was the Red Grand?

A. No, I didn't claim that, and I thought it was like a Sun Grand or Red Grand.

Q. Is the Red Grand one of the patents that have been assigned to you? A. Yes.

Q. To refresh your memory, didn't you say "This is a Red Grand"?

A. No, I don't think I said that, because I don't know either one very clearly.

Mr. Griswold: I didn't get that. Miss Reporter, will you read it?

(Answer read.)

Q. Then did Mr. Hagler tell you that this was a freestone and the Red Grand was a clingstone?

A. He didn't mention about clingstone or free-stone; he just showed me.

Q. What else did you do that day when Mr. Hagler called [190] on you?

A. Well, he show me that, you know, so I says, you know, this is young tree or grafted tree, or

(Testimony of Hyeng (Harry) S. Kim.)

well developed, and I couldn't tell exactly what varieties they were.

Q. Am I correct that you told him that you didn't know what kind of variety it was?

A. Yes, that minute what kind of variety.

Q. Now, how long did you and he talk there?

A. Oh, I was busy, you know. I didn't talk very long.

Q. That was a friendly visit?

A. Well, of course, he was my customer and he come in once in awhile, we still friendly.

Q. You didn't know anything about what he claimed to be a new variety until he came that day? This is the first you knew? A. Yes.

Q. Following 1954, did you write any letters to Mr. Hagler? A. No, sir.

Q. Did you go down and look at the tree?

A. Whereabouts do you mean? Mr. Hagler or Mr. Hunter?

Q. When Mr. Hagler told you that he had found a new variety on a tree?

A. Yes, he said at that time, you know, that he found the fruit, you know, Mr. Hunter's orchard, so I went down in '54. [191]

Q. Who did you go with in 1954?

A. Myself, Mr. Anderson and Mr. Stafford.

Q. Did you talk with Mr. Hagler?

A. No, I didn't see Mr. Hagler there.

Q. Did you find the tree? A. Yes.

Q. Where was the tree? Or the trees?

(Testimony of Hyeng (Harry) S. Kim.)

A. Well, that trees are located in easterly row, on the second row, if my memory is correct.

Q. The eastern row, the second tree?

A. Second row of trees, yes. Two trees there. The easterly row, and the second row.

Q. And you found fruit. Did it look like the fruit that Mr. Hagler had shown you at your office in Reedley?

A. It seems to me that is quite different what I see Mr. Hagler's fruit, and where that grafted tree is fruit, that grafted tree is our Sun Grand.

Mr. Shepard: What is that answer, Miss Reporter; it is quite difficult to hear?

(Answer read.)

Q. (By Mr. Griswold): How many trees did you see that had fruit on them on this occasion?

A. Well, that time there was two Sun Grand trees, you know, and I—my observation was very cursory, and that is [192] all the Sun Grand, the two trees, what I saw that time, and these was grafted trees, and those two trees I looked at thoroughly is Sun Grand, and they graft on Sun Grand.

Q. You say you saw two trees that you identify as Sun Grand? A. Yes; at that time.

Q. How many had fruit on?

A. Well, they didn't look, about a maximum of two years, about year and a half, but not any tree crop, but they could get several good fruit there.

Q. Did both trees have fruit on them?

A. Well—

(Testimony of Hyeng (Harry) S. Kim.)

Q. Did both trees that you found to be Sun Grand——

A. ——I saw that time, you know, one tree is Sun Grand, is more fruit than any of the trees, you know, they graft over, and two trees I see is Sun Grand.

Q. Isn't Mr. Anderson your expert?

A. Yes.

Q. And you rely on him to tell you various varieties, do you not? A. Yes.

Q. And isn't that the reason you took him down to the orchard in 1954? A. Yes, sir.

Q. Did I misunderstand, you said something about—I [193] might have misunderstood—stealing some buds, Sun Grand buds, is that what you said?

A. I didn't say stealing; I said grafted.

Q. All right. Let's just concentrate on this tree, the eastern row, outside row, the second tree.

A. Second row of trees.

Q. In other words, the second row as you come east to west? A. Yes.

Q. But it is the outside row north and south?

A. Yes.

Q. What were the rest of the trees in that orchard?

A. The balance of orchard was LeGrand orchard.

Q. And that was Mr. Hunter's orchard?

A. Yes, sir.

Q. Now, isn't it true that you sold only LeGrand nectarine trees to Mr. Hunter for this orchard?

(Testimony of Hyeng (Harry) S. Kim.)

A. No, sir; we sold two varieties, LeGrand and the Red Grand.

Q. But no Sun Grand, or plant 974?

A. No, sir.

Q. How do you explain, as you say, that your Sun Grand bud or graft was on this tree which you identified as being the outside row and the second tree?

A. Well, we went down there, ride in car and get out of [194] car, and we go up and down the rows, you know, to find it, so finally we found the trees.

Q. But how do you explain—you say that you found the Sun Grand; how do you explain the Sun Grand being there?

A. Well, we search for the Sun Grand, and up and down the rows, you know, why, there we discovered it, there is Sun Grand.

Q. You sold no Sun Grand?

A. I sold, no, sir; I didn't sell the Sun Grand at all, to the gentleman.

Q. It is your testimony that there was a graft, a Sun Grand graft on this particular tree?

A. Yes, sir.

Q. How about this other tree, which you claim to be Sun Grand? Where was it located?

A. Near by, side of the tree.

Q. Which side? A. East side.

Q. The next tree? A. Yes.

Q. Which side, the east side?

A. Yes, the east side of where the Sun Grand is,

(Testimony of Hyeng (Harry) S. Kim.)

the next tree is east side of the Sun Grand where the fruit is.

Q. Did you take any photographs of this tree?

A. No, sir, I didn't take any photographs. [195]

Q. Did anybody else with you?

A. Well, Mr. Stafford and Mr. Anderson maybe did.

Q. Did they take any photographs of this tree?

A. I don't think so.

Q. From your memory, what is your basis for your statement that this was a grafted tree?

A. Well, I saw, my eyes, that was graft, was not a sport, you know, cut off the tree and put the scion up there, that's not a natural sport or mutation.

Q. You say you saw it was a graft. What made you conclude it was a graft and not a mutation?

A. Well, I conclude, you know, mutation and graft is entirely different. This is a cut out of a limb and they put two or three scions, that is the way they grow the scions in growing the fruit.

Q. How does that differ from a mutation of a sport?

A. Well, of course, a mutation, you know, they grow naturally. I am not technical, you know. That part Mr. Anderson knows more than I, but what I saw, you know, mutations they come from where the limb, you know, the—I don't know what you call, the blade, you know, they grow natural, the sport or mutation, then they produce the fruit from this. But this is cut, cut it out and put the scion and that scion grow and use it in the crop.

(Testimony of Hyeng (Harry) S. Kim.)

Q. Is that your only basis that this was a [196] graft?

A. Sure. You can see the graft, you know, how it budding.

Q. Do you know who did any budding or grafting on this tree?

A. I don't know. I think Mr. Hunter——
Mr. Shepard: Wait a minute now.

The Court: He doesn't know who did it. Did I understand you to say that you saw the place where it had been grafted?

The Witness: Yes, sir; I saw the—when I went down there, you know, it was grafted tree, is not the natural or sport or mutation.

The Court: But in a grafted tree you can see where it has been grafted and cut and another slip, or whatever they call it, put in and tied up and allowed to grow.

The Witness: Yes, sir.

The Court: You saw that on that tree?

The Witness: Yes, sir.

The Court: Did you call it to Mr. Hagler's attention?

The Witness: No, sir, I didn't see Mr. Hagler that day.

The Court: Oh, you didn't see Mr. Hagler?

The Witness: No, sir.

The Court: I see. All right.

Q. (By Mr. Griswold): Do you know what kind of a tree was supposed to be growing in that

(Testimony of Hyeng (Harry) S. Kim.)

orchard at that spot that you have described [197] as the second tree in the first row?

A. Well, I don't know at present time, you know; that time was two Sun Grand trees when I looked. Right now I don't know what they changed.

Q. Mr. Kim, didn't you sell this orchard to Mr. Hunter as a LeGrand orchard?

A. I told you we sold LeGrand variety and Red Grand.

Q. No, in this area where you observed what you claim to be a Sun Grand, didn't you sell that orchard to be true to the LeGrand nectarine?

A. That is whole field, you know; that is right. I beg your pardon.

Q. You sold as LeGrand? A. Yes, sir.

Q. What kind of root stock was on those trees that were supposed to be all LeGrand?

A. Peach root.

Q. What kind of peach root? A. Lovell.

Q. L-o-v-e-l-l? A. Yes.

The Court: Is that freestone or clingstone?

The Witness: Pardon, your Honor?

The Court: Is Lovell a freestone or clingstone?

The Witness: Freestone. [198]

The Court: All right.

Q. (By Mr. Griswold): Were the roots of these Lovell seedlings, or were they otherwise?

A. Well, we plant peaches, you know, and after germinating, you know, they spread out, you know, from the germination, you know, and we grow that. We bud them over to the LeGrand or some other

(Testimony of Hyeng (Harry) S. Kim.)

freestone, or different kind or variety, we bud them.

Q. You take a sack of peach pits of Lovells, plant them in the ground, and when they grow up you then put the LeGrand buds on those little seedlings? Is that right? A. What you mean?

Q. You plant the pits, the Lovells?

A. Yes.

Q. You plant them in the ground, and when they grow up you then take a bud——

A. Bud them over.

Q. Bud them over, yes. A. Yes, sir.

Q. Now, that had been done in this case in your sale to Mr. Hunter of LeGrand nectarines, as you have testified. Do you have any budding or grafting records of any work that you did in the orchard of Mr. Hunter after you made the sale of these LeGrand trees? [199]

A. Well, we just done our own work by all our men, but occasionally the farmers, the growers, you know, want to do that budding themselves. I think Mr. Stafford went down, we have a budding few trees, you know, but we don't keep any of those records.

Q. In other words, your answer is you have budding or grafting records on this Hunter orchard which you sold as LeGrand?

A. For the budding we don't have a record.

Q. Now, LeGrand nectarines—withdraw that question. How long after Mr. Hagler came to your office and said "I have a new variety, I want you to look at it," how long after he came to your office

(Testimony of Hyeng (Harry) S. Kim.)

and told you that did you go down to the Hunter ranch?

A. Well, I didn't put down the date on my calendar, you know, I think about the—I am not sure. It was around about some time in July, if my memory is right.

Q. Of the same year? A. Yes.

Q. So it was shortly after?

A. Yes, shortly after.

Q. Am I not correct that Mr. Hagler on that occasion told you that he was going to bud from this discovery tree and propagate asexually more of the same variety?

Q. No, I didn't hear; he didn't tell me. [200]

Q. All right. Did he tell you at any other time, at any other time, that he was going to take buds from this discovery tree and plant it on his ranch?

A. Well, he didn't tell me at the time, you know, regarding the Hunter tree. In 1956 when I went down in his orchard, you know, he budding over some varieties and I said to Mr. Hagler, "What you doing around there; you are budding my variety." Well, he says, "If your variety I will pay," that is all he say. But he never tell me about that fruit which he brought to my office, or propagating, or any grow, he never mention that.

Q. How did you happen to be down there in 1956, to Mr. Hagler's ranch?

A. Well, occasionally, you know, I go down and see him. I intended to see him at that time. He was

(Testimony of Hyeng (Harry) S. Kim.)

not there, you know, so I went in field and he was budding over there.

Q. Did you ask him what he was budding?

A. Well, I ask him, you know, but he didn't tell me then.

Q. He told you if they were yours, why, he would pay you?

A. Well, that is what he say but he never tell me what varieties of mine.

Q. Did you ask him?

A. Well, I didn't ask him exactly, but I don't know what kind of variety he is budding over there, so he says he would pay if my variety. I didn't demand any more, you know. [201]

Q. Now, from 1954 until 1956 you did nothing about his disclosures to you of his variety?

A. Yes, that's right, nineteen—first I discovered the fruit of Mr. Hagler's orchard, you know, in 1957, the Sun Grand.

Q. Then what did you do when you discovered—how did you discover that fruit you claimed to be your plant number 974?

A. Well, I feel that he might have some of our varieties and also 1954, you know, he bought some new varieties, you know, he claimed, that is the reason I went down there.

Q. In '57?

A. Yes, in 1957, and I and Mr. Anderson, Mr. Taylor, Mr. Stafford, Mr. Floyd Zeigler, Tom Butler, Tom Casabian, we go down and see that orchard.

(Testimony of Hyeng (Harry) S. Kim.)

Q. Are you familiar with the Federal State Marketing News Service?

A. Well, I didn't watch it all the time, but do you mean about marketing for the Sun Grand?

Q. Are you familiar with the State Federal News Service?

A. I am not familiar very much, marketing news. Sometimes I hear, I see the report, and sometimes I didn't see.

Q. So you didn't see the sales of Red King in the 1957 Federal State Marketing News?

A. Yes, I saw that report, you know, the Red King, it says occasionally, you know, lower prices than the Sun Grand. [202]

Q. You mean Sun Grands sold at a higher price in 1957 than the Red King?

A. Yes, sir, comparison 1957 and 1958.

Q. Do you recall the spread in the sales prices of the two designations on the Federal State Market News Service?

A. Yes.

Q. What is it? Do you remember how much difference?

A. Oh, I see some reports, you know, about 50 cents, 35, and the highest, you know, 75 cents and 25 cents.

Q. You are speaking now of the net differences between the sales of Sun Grand and the sales of Red King?

A. Red King. The few sales I see higher than Sun Grand, but not much.

(Testimony of Hyeng (Harry) S. Kim.)

Q. You are familiar with the Gold King nectarine? A. Yes, sir.

Q. Do you know who the owner of the Gold King patent is? A. I think is **Mr. Hagler**.

Q. Mr. L. A. Hagler, the defendant in this case?

A. Yes.

Q. We can all be mistaken, can't we, Mr. Kim?

The Court: Well, that is arguing with the witness.

Q. (By Mr. Griswold): Did you make the claim in the Gold King that that was also one of your patents? A. No, sir, I didn't. [203]

Mr. Griswold: No further questions.

The Court: All right. Any questions?

Mr. Shepard: We have no questions at this time.

The Court: All right. Step down. Call your next witness.

Mr. Griswold: Just one more question, your Honor.

The Court: Yes.

Q. (By Mr. Griswold): Of course, you are familiar with mutations or sports. Now, directing your attention to what you saw in 1954, we will call it the Hagler parent tree, what you observed you say was a graft. Can you tell us what height above the ground was this apparent graft you saw?

A. You mean Mr. Hunter's place?

Q. I mean Mr. Hunter's. Thank you. So we won't be confused, that will be the second tree in the——

(Testimony of Hyeng (Harry) S. Kim.)

A. Around knee high, I believe, a little better than knee high.

Q. Can you designate that in feet?

A. I don't know, maybe about three feet, over.

Q. About three feet?

A. About three feet over, I guess. Some people cut it low and some people they cut it high, and some people they cut it medium.

Q. But you observed this at about three feet?

A. Yes. [204]

Q. Describe what you saw of that tree, as far as the trunk and the number of branches, or divisions of that tree, the basic divisions, the large limbs coming up, if any?

A. Well, they not much large limbs, the size, you know, they grow and not very long. They had fruit but limbs, you know, are not so big.

Q. How big around was the trunk when you saw it?

A. You mean circumference?

A. No, the part from the ground up to the first fork, how big around was the tree?

A. Well, I don't know; I am not positively sure, you know; it is about around four or five feet, that time.

Q. I don't believe I understood your answer. How big around was the trunk?

A. Well, around trunk, you know, you mean the grafted place?

Q. At the graft or otherwise?

(Testimony of Hyeng (Harry) S. Kim.)

A. Well, it is a quite big tree, at least, you know, about four or five years old tree.

Q. You made no measurements?

A. No, sir, Mr. Griswold, I don't have any measurements.

Mr. Griswold: No further questions.

Mr. Shepard: No questions.

The Court: Step down. I think we will take a short recess for the afternoon, then we will not interrupt the next witness. [205]

(A short recess was taken.)

The Court: All right, call your next witness.

Mr. Griswold: Mr. Hagler.

Mr. Houk: Mr. Hagler, will you take the stand, please?

LYLE ADRIAN HAGLER

the defendant, called in his own behalf, having been previously duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Houk:

Q. Mr. Hagler, you have already stated your name and your address. What is your general business, Mr. Hagler? A. Rancher.

Q. And approximately how many acres of fruit do you have, fruit trees?

A. Oh, about 600 acres.

Q. And you also have other farming operations?

A. Yes, sir.

(Testimony of Lyle Adrian Hagler.)

Q. And what are they?

A. I have got dairy, and cotton, beef cattle.

Q. Pardon me? A. Beef cattle business.

Q. And how many acres of cattle land do you have? A. You mean rented or owned?

Q. Both. A. Oh, about 4,000 acres. [206]

Q. And how long have you been in this type of business, generally speaking? Have you been farming all your life? A. Yes, sir.

Q. And how long have you lived in this particular location, or approximate location?

A. 43 years in the present house I am living in.

Q. And approximately how long have you been in the fruit growing of trees and fruit crops, particularly nectarines?

A. I believe around 1945 I started on the nectarines. I am not right sure, '44 or '5.

Q. Now, you have heard the discussion here in court with reference to the Hunter place. Is the Hunter ranch or property near your ranch?

A. Yes, it is just across the road, and a little north.

Q. In the past few years have you had any arrangement with Mr. Hunter about taking care of his fruit?

A. Only in the picking and packing.

Q. And during the year 1954 was that the agreement? A. Yes, sir.

Q. And did you pick and pack his fruit at that time? A. Yes, sir; I did.

Q. And during that particular year did you dis-

(Testimony of Lyle Adrian Hagler.)

cover any fruit other than the regular fruit that ordinarily came off his ranch?

A. Yes, sir, they brought in, and on the load which [207] came in from the orchard, and I went out there and looked to see where it came from and discovered this tree that had the red fruit on it.

Q. And was the fruit the same as the other fruit that was taken off the ranch?

A. No, it was highly colored and quite a bit different.

Q. And then what did you do with this fruit in particular? Did you take any of it anywhere?

A. Well, I took it up to the office packing house and called Mr. Deredian's attention to it, and he looked at it and said——

Mr. Shepard: Just a moment.

The Court: You can't testify what he told you.

Q. (By Mr. Houk): Just testify to what you did, Mr. Hagler.

A. I took some to the office.

Q. Did you take any of the fruit to see Mr. Kim?

A. Yes, I believe the next day.

Q. And will you tell when you arrived there, did you see Mr. Kim?

A. Yes; he was in his office.

Q. Was there anybody else present besides you and Mr. Kim?

A. No, not in his office; there was someone across the hall in another office.

(Testimony of Lyle Adrian Hagler.)

Q. Would you repeat the conversation you had with Mr. [208] Kim at that time?

A. Well, I had, I don't know, two or three of this variety of nectarines, and I laid them down on his desk and told him it looked like I had a new nectarine. Mr. Kim says, "It looks like my Red Grand." I said, "I bought some Red Grand trees from you last year, and I had the understanding they were clingstone," and he said, no, they were not. Then he thought a little while, and he said they were, and I says "These are freestone, then they can't be Red Grand." Mr. Kim says, "Well, I got some in my cooler in the room and we will look at those," and we went in and he had three or four kinds, three at least. I don't think he had Red Grand, but he had what he called Sun Grand and two or three other varieties, I don't remember what, and we laid these nectarines kind of down on the table and they were a lot larger than any that Mr. Kim had, and a little different color, and he didn't say a thing for a little while, then he says, "I don't know what those are, but they are one of mine." That's all he said at that time.

Q. What did you say to him you were going to do?

A. I told him I had a block of cling peaches that were about two years old, they were all mixed with several varieties, I found out, and I was going to dormant bud about ten acres, all I could of what buds I could get off of this tree. And I don't

(Testimony of Lyle Adrian Hagler.)

remember what Mr. Kim said, I [209] don't think he said anything at the time about it.

Q. Was anything said about him being paid for this, if it was any of his type of fruit?

A. I told him at the time if it proved out to be his fruit I would pay him for it.

Q. Now, this particular tree that this fruit come off of, would you briefly describe it, as to how old it was, and how high?

A. Well, it was about ten or twelve foot high, they were picking through the orchard with 12-foot ladders, and it was just as high as any of the other trees in the orchard.

Q. Did you check the particular limb the fruit come off of, to form an opinion in your own mind as to what you thought was the cause of this fruit growing this way?

A. Well, it looked like it was always there; it didn't look like it was any graft. It looked like a sport, came up close to the ground, maybe eight or nine inches from the ground, before it branched off from the other side of the tree.

Q. At this time, Mr. Hagler, I show you U. S. Patent, plant patent 1718, and ask you to look at this. You recognize that as a patent to you?

A. Yes, I do.

Q. Is that the patent that you applied for on this [210] particular fruit?

A. Yes, that is the one.

Mr. Houk: If the Court please, at this time we would like to introduce this into evidence. We have

(Testimony of Lyle Adrian Hagler.)

the original patent, and we also have a certified copy from the Patent Office.

The Court: We will take the certified copy.

Mr. Shepard: Your Honor please——

The Court: Yes.

Mr. Shepard: ——for the record we will make an objection to the admission of this document on the grounds of lack of notice, and lack of pleading by the defendant of this patent as a defense, particularly on Section 282 of 35 U. S. Code, and on other case grounds.

The Court: The objection will be overruled. The Court feels that while the requirement of notice is not met there has been no showing of harm, the defendants have been informed orally about the patent, and the section gives the Court power to allow patents which are relied upon to be offered even though the written notice has not been given. Furthermore, I think regardless of the patent itself, the fact that the fruit grown is the result of a polinization by the defendant is a defense which is open under the pleading, just as if it were a mechanical device the defendant would have a right to show that the device he [211] uses is entirely different from the device, even though he does not attack the patent. That was done in one of the cases to which I referred yesterday.

Objection overruled. All right. It may be received.

The Clerk: Defendant's Exhibit A.

(Testimony of Lyle Adrian Hagler.)

(The patent referred to was marked as Defendant's Exhibit A, and was received in evidence.)

Q. (By Mr. Houk): Mr. Hagler, referring to these particular trees that you have on your own place, which fruit has come off of, and which is referred to as Red King trees, which would be under this patent 1718, have those buds all come off of this sport on this original tree?

A. Yes, sir; all that block, yes, sir.

Q. Have you ever planted or budded or grafted any Sun Grand on your property?

A. No, sir.

Mr. Shepard: Well——

Q. (By Mr. Houk): Mr. Hagler, this particular tree we have in question, now, you have seen this tree at various times this last fall and summer?

A. Yes, sir, I have.

Q. And at the present time, or recently, in looking over this tree, was any change made on the base of the tree or [212] limb, as far as you know?

A. There was a little change about May some time, I believe it was; there was a limb growing out from the trunk about a foot from the ground, and it disappeared. I don't know where it went to.

Q. Did it have fruit on it?

A. It had one nectarine.

Q. And had that been cut off?

A. Yes, sir; it had been removed.

Q. Did you have it cut off?

(Testimony of Lyle Adrian Hagler.)

A. No, I didn't; no one seemed to know where it went.

Mr. Houk: If the Court please, I would like to ask the witness a question for just a minute, before I try to make this introduction in evidence, to see if he is qualified to testify.

The Court: Yes. Go ahead.

(Conference between counsel and the witness.)

Mr. Houk: That is all the questions we have at this time.

The Court: Cross-examine. Since you made the discovery, in '54 did you say it was?

The Witness: Yes, your Honor, '54.

The Court: How many trees have you budded?

The Witness: Oh, I budded 968 off of this tree, then in '57 I budded about eight acres more. [213]

The Court: How many trees to the acre?

The Witness: There is 90 trees to the acre, a little over 1,700 trees all told.

The Court: Of this variety?

The Witness: Yes, sir. I didn't follow up in '54, I let it go a couple of years to see what I had, then I went ahead.

The Court: What do you call it? What is the name of it?

The Witness: Red King.

The Court: Red King. All right.

(Testimony of Lyle Adrian Hagler.)

Cross-Examination

By Mr. Shepard:

Q. For the record, Mr. Hagler, do you have the exact number of these Red King trees on your ranch?

A. Well, I stated in my deposition, at that time I went and counted them, but I haven't since and I have kind of forgotten exactly at this time.

The Court: Well, if you have his deposition maybe he will confirm what he said in his deposition.

Mr. Shepard: That is correct, your Honor.

Q. In your deposition you mentioned 968 trees—counsel, I picked that up on several pages—

A. Yes.

Mr. Shepard: —on page 23.

The Court: What base did you use? [214]

Mr. Shepard: Four pages—pardon me, your Honor. Page 14, counsel. There were 968 older trees.

A. Yes.

Mr. Shepard: You verify, so he knows I am talking about line 10.

The Court: Well, you can figure; he said 90 trees to the acre, was it?

The Witness: Ninety.

The Court: And what was it, 80 acres?

The Witness: No; it was 10 acres, I believe.

The Court: Oh, ten acres.

The Witness: The first, a little over ten acres of the first lot I put in, the first year, in '54.

(Testimony of Lyle Adrian Hagler.)

Q. (By Mr. Shepard): Well, can I go through your deposition, Mr. Hagler, I think you counted them right before then, and you can verify it?

A. Go right ahead, as far as I am concerned.

Q. You mention 968 of the older trees, that was the first block?

A. That is right.

Q. That was at line 10, and then there was an additional row of younger trees right adjacent to the first block about five rows?

A. Yes. [215]

Q. And you have mentioned—counsel, page 8, lines 11, 12 and 13—220, 44 long and 5 wide, we multiplied there?

A. That is right.

Q. Then in the plot immediately behind your farm house, right at the back side of the ranch next to the eucalyptus trees, there is also a young group, and I think you counted those at 660 trees; page 12, line 8, at another place—

The Court: What is the total?

Mr. Shepard: I don't know if it appears any place.

Q. —you mentioned a plot, page 8, line 16, of 28 by 24, as being 672.

A. That probably was the same plot we were just talking about.

Q. As the 660?

A. Yes, sir.

Q. Well, it is one of those two figures, 660 or 672?

A. That is right. They might vary a little. You know, there were a few trees in each block that weren't true.

(Testimony of Lyle Adrian Hagler.)

The Court: How much does that give us, if we add them? Call it 672. 1860?

The Witness: 1860. I didn't figure it exact.

The Court: 968 old trees, is that it?

The Witness: That is right.

The Court: That gives 1860 trees. [216]

Q. (By Mr. Shepard): Now, then, the tree which your counsel described as the parent tree on the Hunter ranch, you first observed that tree in 1954? A. Yes, sir; that is correct.

Q. And what did you observe of that tree when you went out there to the orchard?

A. Well, I got a ladder and got up and looked at the fruit. Most of the fruit was pretty well up in the tree, toward the top, and I noticed it was different fruit than any of the other in the orchard, different than any I had ever seen, red and large.

Q. Was there any other fruit on the tree there?

A. There was some other fruit on the other side of the tree, another limb of LeGrands on the same tree.

Q. As a matter of fact, the whole orchard was supposed to be LeGrand, and you were harvesting LeGrands at that time? A. That is correct.

Q. And it came to your attention that some strange fruit came off of what should have been a LeGrand tree? A. Yes, sir.

Q. Now, would you describe that fruit, as you recall, how it differed from the LeGrand fruit, in general?

A. Well, it was entirely different color, it was

(Testimony of Lyle Adrian Hagler.)

a deeper red color, most of it. Of course, this fruit at [217] that time—it was the end of the season and it was all colored because it was about two weeks later than that variety should have been picked for market, and practically all the fruit on the tree was a deep red color. It was round, and I broke some open and found out it was freestone, real free; red around the pit, and—you just asked for the fruit, not the tree?

Q. Yes; the fruit. Go ahead.

A. That is about all I could say. It was new to me.

Q. At that particular time, whatever day that was in July, did you observe any difference in the flesh, between the LeGrand and this new fruit that you claimed?

A. Well, it was pretty ripe.

The Court: Pretty what?

The Witness: Pretty ripe, and it was late in the season for that particular kind, I guess; it had kind of lost its flavor. It had been irrigated along with the LeGrands and that is the reason. It was still firm, though.

Q. (By Mr. Shepard): Did I hear you mention awhile ago that it was probably two weeks beyond its picking time?

A. Perhaps it was, because I don't believe I picked fruit in Mr. Hunter's orchard until about the 26th of July.

Q. Now, were there any other noticeable—with-

(Testimony of Lyle Adrian Hagler.)

draw that. Would you describe the limbs of the tree and the leaves, to [218] the extent you observed them, of the whole tree?

A. Well, that particular side of the tree, the limb there seemed to be a very vigorous growing tree. It was large with real large leaves. I am not a plant expert. I just looked at it and seen it was different, even the bark looked a little bit different, a little grayer, and more vigorous growing than the LeGrand alongside of it.

Q. Now, what about the leaves? Did you notice the leaves on the tree at that time, or did you go back later and notice them?

A. No, I never. I just looked; they looked like they were larger leaves, that is all I knew about them.

Q. Would you distinguish between the surface skin of those two fruits, that is as to smoothness, between the LeGrand and this new fruit you call Red King?

A. Well, I think they were about the same, except maybe this was a little more glossy, like it was polished or waxy looking.

Q. You might say a little smoother?

A. Well, I would say a little smoother.

Q. And the color you have already said, I think, was probably redder than the LeGrand?

A. Oh, yes, real red.

Q. All right. And the flavor, did you try out the flavor? [219]

A. Yes; the flavor of those weren't as good,

(Testimony of Lyle Adrian Hagler.)

didn't taste very good. We figured it was on account of being irrigated with the LeGrand, kind of knocked the sugar out of it. It had plenty of juice, and they weren't mealy, they were firm.

Q. Have you since formed an opinion as to whether or not there is a difference in flavor between the normal Red King you grow now and that LeGrand?

A. You mean difference between that and LeGrand?

Q. Yes. A. You mean the flavor?

Q. Yes, sir.

A. I don't know, I like this a little better, I think; it seems to be a little sweeter.

Q. Would you say the Red King is a little more tart?

A. Well, it might be a little.

Q. How about the size of the Red King, as compared to the LeGrand, that is the average size?

A. Oh, it kind of varies. We have had some awful large Red Kings, and I believe it is just a little smaller on the average size than the LeGrand.

Q. Yes. Now, then, did you notice any other limb, leaves or fruit on that tree different than the Sun Grand or—strike that—different from the Red King, as you now call them, and the [220] LeGrand?

A. No; there wasn't any more fruit on it.

Q. Well, did you notice any limbs that were different?

A. Well, there was another limb on it that didn't have any fruit at the time. I suppose it was peach,

(Testimony of Lyle Adrian Hagler.)

but I wouldn't be sure. It must have been an early variety as the fruit was gone.

Q. In your best opinion there was another limb which was a peach limb?

A. Well, I imagine it was.

Q. Now, you took two or three of this fruit, as you say, to Mr. Harry Kim in Reedley?

A. Yes; Mr. Kim, the gentleman right down there.

Q. And you told him they were from the Hunter ranch?

A. Yes, sir; I did.

Q. Did Mr. Hunter later bring to your attention a letter of warning from Mr. Kim, that they claimed there was a Sun Grand on Mr. Hunter's ranch, or Sun Grand tree?

A. No; I don't believe he did. He told me that he got a letter from Kim, ordering him to dig up a tree or two that he had there.

Q. That was the same year, wasn't it?

A. Yes, sir.

Q. All right. Did you observe any Sun Grand fruits before 1957?

A. No; I don't believe I did. I believe it was '57; [221] possibly in '56, I went out to Mr. Escaradian's orchard and looked at his. He said he had a block of ten acres of true Sun Grand. They weren't quite ready to pick; when I was picking mine, but I never went back. He had just a few, but they were a different shape and a little lighter color, and a little smaller than my particular kind.

(Testimony of Lyle Adrian Hagler.)

and I didn't go back later because I got too busy with my own fruit.

Q. That was in the summer of 1956?

A. I am not certain, '57 or '6, I am not sure; I believe it was '57.

Q. Now, you shipped some of the fruit from this original block of what you call Red King, as you stated earlier you shipped a few of those fruit in 1956?

A. Yes; a few.

Q. And what name or label did you ship them under?

A. I am not certain. I was away most of the time, and people in the packing house was picking them about the same time that some of the other varieties were picked. There was just a few, running a field crew and there wasn't enough to fill up a belt and they run with other fruit, but I believe they labeled most of them Red Grand; I am not sure.

Q. Red Grand?

A. I am not sure, but I think Red Grand.

Q. You had Red Grand on your place? [222]

A. Yes, sir.

Q. Do you have any records of how many of those, what we will call Red Kings, you harvested in 1956?

A. I think I stated in my deposition around 360, but since then I have kind of checked up, and it seems like it might have been a little less, maybe 260, something.

Q. 260 what?

A. Or 160.

(Testimony of Lyle Adrian Hagler.)

Q. Field boxes?

A. No; packed out boxes.

The Court: What is it, 260 what?

The Witness: 260 pack outs. I haven't got the exact figure, because they are mixed up. I know part of them were this particular Red King.

Q. (By Mr. Shepard): Now, this '56 would have been the first year then that you commercially harvested any amount off those Red Kings?

A. Well, the first year that they could have bore any was 1956.

Q. All right. Now, when you budded these trees in 1954, you budded the original block of 968 trees, at the first budding opportunity after you had discovered it? A. Yes, sir.

Q. I suppose that would have been in the [223] winter?

The Court: What did you bud them to?

The Witness: I budded them to the Red King and put on my cling peaches, two-year-old trees, cut them, just put them in the limbs, the buds.

The Court: I see.

Q. (By Mr. Shepard): What time of the year was that?

A. I believe it was August, August or September. It was getting late August or first part of September, somewhere in there.

Q. And all of those buds came from one branch?

A. Yes, sir, on this one tree. Of course, this branch came up and forked and on each branch, it covered almost half of the tree.

(Testimony of Lyle Adrian Hagler.)

Q. And the buds, I suppose you budded, put three or four buds to each one of these cling trees?

A. Some of them three and four, one bud in each limb.

Q. So that you would have got approximately a minimum of possibly 3,000 buds off of this one branch?

A. Probably, I don't know just how many.

Q. And had you taken any full box samples of the Red King from this one tree before you started your budding? Had you taken such samples of a box, or several boxes, to a packer or anybody else, to display?

A. No, sir; I didn't. [224]

Q. And the fruit from the so-called parent tree, you say probably was not as good flavor as they later developed into?

A. Well, at the time—now, since they go to sap earlier we know, when they are first full of sap they are very good flavor.

Q. And so at the time you budded the ten acres or 968 trees, could we say that was more or less an experiment on your part?

A. Yes; I think it was. I thought I would try them out.

Q. And were you following those ten acres with some interest as they developed?

A. Yes; I watched them.

Q. But the first year they bore fruit and were harvested, in 1956, you didn't keep any segregation

(Testimony of Lyle Adrian Hagler.)

of them so you can tell us now how many boxes exactly?

A. Well, I believe it was on my records there somewhere. I brought in those other records, you have them.

Q. You shipped them under some other name than Red King?

A. Well, they didn't know what they were at the packing house at the time, and a part of them went, I am not sure.

Q. Mr. Hagler, in your opinion in 1954, at least after you showed the fruit to Mr. Kim, you felt this was a new [225] variety, did you?

A. I certainly did. After I had taken them to Mr. Kim and he couldn't identify it, he didn't know what they were, he said he had Sun Grand there in his cooler, and they certainly didn't look like what he had.

Q. Now, the Red Grand is considerably different than the so-called Red King, isn't it?

A. Yes; it is a little different.

Q. Different, yellower color?

A. A little yellower, not quite as red.

Q. It is a clingstone, isn't it?

A. Yes; it is cling.

Q. Then when you shipped these in 1956, you were convinced they were a new variety?

A. That's right. I made up my mind thoroughly. I have been told by different people that seen them that they were different, and I hired a man that really should know and he found a big difference.

(Testimony of Lyle Adrian Hagler.)

Q. When was that? A. '56.

Q. What was that man's name?

A. Mr. Braun.

Q. Mr. Braun here in court, from the State College here? A. Yes, sir.

Q. And did he advise you in 1956 that they were a new [226] and distinct variety?

A. Yes; he said they were different, after he looked them over thoroughly and examined them.

Q. All right. Now, in 1956, did you feel by that time, having seen the parent tree and watched the ten-acre plot grow for two years that this new variety was a pretty good thing?

A. It looked like it might be, because they were new and seemed like they would bear pretty well, so I went ahead with them. I put in a few more, but I haven't since because I know a little more.

Q. Now, you first applied for your patent, at least formally applied——

The Court: '57.

Q. (By Mr. Shepard): ——October 28, 1957?

A. Well, I believe, I don't remember the date. I worked on it through all the summer the year before.

Q. Pardon me?

A. We worked on it all summer the year before, all of '56 preparing.

Q. Now, did you sign the patent application?

A. Yes, sir.

Q. And did that patent application describe this Red King, as you saw it? [227]

(Testimony of Lyle Adrian Hagler.)

A. Yes; I believe it did.

Q. Have you read the plant patent 1718?

A. Yes; I have read it.

Q. Now, you have also discussed the matter, I suppose, with Mr. Braun and other people, discussed your fruit with them, as interested parties?

A. Yes.

Q. In what manner, Mr. Hagler, do you feel that your Red King differs from the Sun Grand?

A. Well, I think it's—well, I haven't followed it right close all summer, but it is a little different shape, for one thing.

Q. A little what?

A. Little different shape, is longer and has more of an apex, and I think from what I have observed Sun Grand is a little lighter color, it isn't quite as dark, and also the Red King is a little lighter fruit than the Sun Grand.

Q. Any other significant differences?

A. Well, there is a little difference in the blossoms that—in the leaves.

Q. What differences are there in the blossoms that you recall?

A. Well, I will have to have Mr. Braun answer that, because I am not right familiar with the blossoms. I had him analyze those [228] thoroughly.

Q. Do you notice anything different as to the ripening date?

A. Well, the last three years has been very—a

(Testimony of Lyle Adrian Hagler.)

lot of difference. In '56 what we got was from the 7th to—one picking on the 7th and the last on the 16th, but this last year it was the first of July, everything was early a couple of weeks, ten days early.

Q. Now, when you say ten days early——

A. They came right in with early LeGrands this year, and usually they are about five or six days later.

Q. When you use the word “usually,” Mr. Hagler, how many years background do you have to form an opinion as to what the usual ripening date of the Red King is?

A. Well, just three years.

Q. '56, '57 and '58? A. Yes, sir.

Q. When did they ripen in '56?

A. That is what I say. I picked the first picking the 7th of July, and one more picking was on the 16th.

Q. Was that in '56? A. Yes, sir.

Q. In '57, last summer?

The Court: Summer before last?

Q. (By Mr. Shepard): That is right, summer before last. [229]

A. Summer before. Well, I would have to look at my book to refresh my memory.

Q. Did you bring those records with you?

A. Yes; they are here. You have them, or they are here.

Mr. Shepard: I don't have them. May we have those?

(Testimony of Lyle Adrian Hagler.)

The Court: Well, if he has a document that will show the ripening date. Have you got that?

Mr. Shepard: I subpoenaed the records, your Honor.

Mr. Houk: I don't think the records will show ripening time, they will show when packed.

The Court: Well, they would show when he began picking, if they were ripe when picked, wouldn't they?

The Witness: They pack the same day we pick.

The Court: Well, if he says it shows, show him the book. Let him find it. He knows what he put down.

The Witness: 1957, was that the year we were looking for?

The Court: Yes.

Mr. Shepard: Well, I would like all years from your records, so there will be no mistake.

The Witness: 1958, here.

The Court: Start back to '56, what the entries show there.

Q. (By Mr. Shepard): Take your time. I know records are confusing to look at.

A. You subpoenaed the LeGrands and all, so I have got [230] the whole works here.

Q. Yes; I want to ask about LeGrands later.

A. It says here we started on the 8th of July.

The Court: We are talking about what year?

The Witness: 1957.

Q. (By Mr. Shepard): Would you read me, Mr. Hagler, in 1957 the dates, whatever those are,

(Testimony of Lyle Adrian Hagler.)

picking and the shipping dates, the amount and the day, as to the Red King? July 8th.

A. Wait a minute, I have got the wrong set of books. This is Mr. Girazian's, you supoenaed his, too, I believe.

The Court: He is interested in what your records show.

The Witness: Here is 1957. What was the question?

The Court: The first day you began picking.

Q. (By Mr. Shepard): Let's take it slowly. In 1957, did you personally have records of the picking or packing dates of your Red King nectarines?

A. Yes; I have.

Q. Ranch records, whatever it is.

A. July 8th I started, finished on the 20th.

Q. Would you give the days and the amounts? July 8th was how much?

A. July 8th we packed out 639.

Q. These would be lugs? [231]

A. Yes, sir. And the 12th we packed out 1050. 13th we packed out 486. The 16th we packed out 1100. The 17th, 280, and on the 20th, 511. That is 1957.

Q. All right. The 20th was the last day?

A. Yes, sir.

Q. Now, in 1956 you said there was a little confusion on your records, and I won't—

The Court: Well, he said he could tell 260 lugs, is that the idea?

The Witness: In nineteen—what year?

(Testimony of Lyle Adrian Hagler.)

The Court: '56, you said you mixed them up with the other.

The Witness: I think I can find them now. I had the wrong papers awhile ago. In 1958—I don't seem to have '56 here.

Mr. Shepard: All right.

The Court: All right, go to '58 now.

The Witness: '58, July 2nd. You want the number picked?

Mr. Shepard: Yes.

The Witness: 913; July 5th, 1145; July 8th, 1237; July 13th, 660; July 19th, 259; that is the total.

The Court: All right.

Mr. Shepard: That was five figures.

The Witness: Well, some of those run in together, Mr. Shepard. [232]

Mr. Shepard: Oh.

The Witness: Let's see. Maybe not on '58, but '57 do. I believe about three pickings in '57.

The Court: All right.

Q. (By Mr. Shepard): Do you know of any other Red Kings, so-called, which are planted on any other ranches in California which have yet to come into bearing?

A. Well, not—my brother, he has a few, I don't know, not very many, just started to bearing a little this year, grafted trees.

Q. Did he ship any this year?

A. Yes; he shipped a few.

The Court: Other than your brother, have you

(Testimony of Lyle Adrian Hagler.)

engaged in selling them commercially, or just use them for your own?

The Witness: No; we sell them. Mr. Girazian sells all our fruit.

The Court: I mean the trees themselves?

The Witness: Well, no; we haven't sold any trees at all; we are just using them ourselves.

Q. (By Mr. Shepard): Now, sir, do you have your records on LeGrand nectarines for those same years, '57 and '58?

A. I have them here somewhere. I am not familiar with these records, my bookkeeper keeps them. [233]

Q. I want you to take your time.

A. It is a little difficult for me to recognize them without taking a little time. I won't take any more time than I have to, because we are kind of in a hurry. Here is LeGrand in 1956. You want the Regulars or the Earlys?

Q. Well, would it be convenient to take them both at once? Let's eliminate 1956.

A. They kind of appear to be a little mixed up here.

The Court: Let's start with '57, because you say you have them segregated there.

A. '57, the Regulars started July 17th. You want each day of pick?

Q. (By Mr. Shepard): Yes.

A. July 17th, we packed out 1132; on the 18th, we packed out 2160; on the 19th, we packed out 2592; on the 20th, we packed out 3407; on the 21st,

(Testimony of Lyle Adrian Hagler.)

we packed out 2272; on the 22nd, we got, packed out 3684; 23rd, we packed out 6435; and July 25th, we packed out 5162; July 24th, we packed out 3456; July 26th, we packed out 2632; July 27th, we packed out 4232; July 28th, we packed 3759; July 29th, we packed out 5229; and July 30th, we packed out 3576; 31st, we packed out 1231; August 1st, we packed out 1115; August 3rd, we packed out 2461—we got the 3rd before the 2nd—August 2nd, we packed 1662; on the 4th, we packed out 2436; and August 5th [234] we packed out 822. That appears to be the total.

Q. All right. Now, could we have that for 1958?

A. Let's see.

Q. On your Regulars.

A. On the Regulars, 1958 season, Regular LeGrands, they were mixed up a little. My crew got them mixed them up with the Early LeGrands, kind of run them in together. June 26th——

Q. Before you begin, does that statement appear in the record, showing the mixup, or is that just your own knowledge?

A. No; my records show the mixup, and I don't know how my broker records are, because I have never seen them, but these here, they was all run in as Early LeGrands, Earlys and all, apparently.

Q. But do your records show which of these are Early and which of these are late?

A. No; it doesn't seem to, no, sir.

Q. Let me see them, if I may.

(Testimony of Lyle Adrian Hagler.)

A. They started about two weeks early on the Early, 26th we start on this, but I know we started on the Regular LeGrands along ten days earlier than usual, even on those. I don't know how I can identify the Early from the Regular.

Q. It would just be your best guess of knowing when you started your Regulars? [235]

A. Yes; it would. I imagine, you see here there is quite a little break between the 4th and 13th. I believe the 13th is when we started on the Regulars, because that is about a week, you see.

Q. Do you have the 1956 record on your Regular LeGrands that are segregated so we could get at least a couple of years?

A. I probably have.

The Court: Well, I think we have taken enough time to go into this. This is more of an accounting. I don't see what bearing it has.

Mr. Shepard: It has this bearing, your Honor, that although Mr. Hagler hasn't emphasized it, his patent claim is the Red King ripens at a different period from the Sun Grand, and it is going to be necessary to have the picking dates, which is the closest to the ripening dates, to determine that factor.

The Court: Well, he can give you that, but the number he picked is not material; he has already given the dates for the others beginning in August.

Mr. Shepard: That point is, your Honor——

The Court: Let's not argue the case. I didn't object, but I don't want to take the time unneces-

(Testimony of Lyle Adrian Hagler.)

sarily, gentlemen. He has given you the dates. Can you give us the earliest date that your record shows that you picked LeGrands in '56? [236]

The Witness: Yes, sir; I believe I can.

The Court: All right.

The Witness: July 7th—wait a minute; that was Early LeGrands. July 18th, the Regulars.

Q. (By Mr. Shepard): What is the latest date you picked, of the Regular LeGrands?

A. August 1, '56.

The Court: All right.

Q. (By Mr. Shepard): Now, just glancing at your record there, and trying to save time, would it appear that July 18th is your earliest date and August 1st your last date, and that in between somewhere would be the heaviest picking period?

A. Yes; I believe you are right. Did I give you '58?

Q. No. '58 is the one you had mixed up.

A. I believe it was the 13th, about a week earlier.

Q. When you began on your Regulars?

A. Yes, sir.

The Court: All right.

Q. (By Mr. Shepard): Now, would you tell me when the Red King, according to your observation, ripens?

A. Well, this year we picked the first picking the 2nd of July; that is a little earlier than we have ever [237] picked them before, but compared with our other fruit, the Regular and Early Le-

(Testimony of Lyle Adrian Hagler.)

Grand, I picked Early LeGrands about the 25th of June, and that is ten days early for them.

Q. Now, would you compare your Red King to the Regular LeGrand?

A. You mean in time of picking?

Q. Yes, sir.

A. I think it was about, this last year it was about ten days earlier than the Regular.

Q. Would you say it was closer to a week, or closer to two weeks earlier than the——

The Court: He said ten days.

Mr. Shepard: He said “about ten days,” your Honor.

A. The 13th and the 2nd, ten days to be exact.

Q. Those were the beginning dates?

A. Yes, sir.

Q. And the beginning dates in 1957 were from the 8th, July 8th to July 17th?

A. You are speaking of the Red Kings?

Q. I am speaking of the Red Kings, started on July 8, in 1957.

A. I believe that is correct.

Q. And the Regular LeGrands started July 17th, and that would be nine days?

A. About nine days. [238]

Q. Now, would it then be your opinion that the Red King ripens from nine to—what is that figure—nine to eleven days ahead of the LeGrands?

A. Well, I was basing my figure on the Early LeGrands, but I believe that would be right with

(Testimony of Lyle Adrian Hagler.)

the Regulars; about four or five days earlier than the Early LeGrands, that is my comparison with LeGrands. I said LeGrand, but I meant Early LeGrands.

Q. Are you talking about the patent now?

A. No; I am talking about the ripening period; that varies from year to year.

Q. You said you made a comparison with the Early LeGrands as to the Red King, as to the ripening period.

A. Well, that is what I figured, about five days difference.

Q. Does that appear in your patent, sir? Is that one of the descriptions that you have?

The Court: Yes; I saw it; he says it comes in between the two, between LeGrand and the Sun Grand.

Mr. Shepard: He is talking about the Early LeGrands, sir.

The Court: Well, he has corrected it. Was your comparison with LeGrands or Early LeGrands?

The Witness: Well, I had in mind LeGrand. I didn't—

The Court: Differentiate between the two?

The Witness: No; I did not.

The Court: Now, make a comparison between this Red [239] King and Early LeGrand, what difference is there as to ripening period?

The Witness: Well, I would say this year there was a big mixup, in this past year, your Honor.

The Court: Well, let's take '57.

(Testimony of Lyle Adrian Hagler.)

The Witness: Going back to '57.

Mr. Shepard: May I have the Red King patent exhibit? I want to refer you to the last paragraph . of—this is the wrong one. 1718.

The Court: You want Exhibit A. I am sorry, I have it. There it is, it is in the claim and also in the specifications.

Mr. Shepard: Would you read the claim there to yourself?

The Court: I think it says five or six days.

The Witness: Yes.

Q. (By Mr. Shepard): Now, what is your description, your best accurate description of the ripening date of the Red King? I refer you to the patent which says it ripens five to six days earlier than the variety LeGrand, and you have said awhile ago that it ripens nine to eleven days earlier?

A. That is what it has the last two years. In 1956 it ripened about seven days.

Q. Well, now, in 1956, you hardly had enough lugs off of the trees to even label them, did you?

A. No; we didn't have too many. [240]

Q. And your patent was not put in to the Patent Office until October 22, 1957, some two months, at least, after the ripening period?

A. Well, we had been working on it in '56, and studying it all through '56.

Q. And you have Early LeGrands on your ranch?
A. Yes; I have.

Q. You are fully aware of the difference between Early LeGrands and Regular LeGrands?

(Testimony of Lyle Adrian Hagler.)

A. Yes; they seem to be a little earlier than Regular, not very much.

Q. Well, the Early LeGrands are about three weeks earlier than the LeGrands?

A. Not down in my place.

Q. Well, do you have the starting dates on any of your Early LeGrands there?

A. Yes; I think I have. This last year, you can't tell anything about it, the fruit ripened way early.

Q. Well, let's look at the years and explain it later. 1956, '57, '58.

A. This is Regular; this is Early. 1957 we started July 3rd.

Q. July or June?

A. July. My early fruit was a little——

Q. Wait a minute, your Early LeGrands you started—30th? [241]

A. July 3rd.

Q. 3rd. Pardon me. When did you start in 1956 on your Early LeGrands?

A. I don't appear to have '56 Early. I have the Regular.

Q. You have given us that.

A. Oh, wait a minute. Yes; here it is. I started July 7th.

The Court: On the Early or the Regular?

The Witness: Early.

The Court: Early, all right. Are we in '56 now?

The Witness: Yes, sir, '56.

Q. (By Mr. Shepard): Now, '58.

(Testimony of Lyle Adrian Hagler.)

A. There was just a few the first day, first and second days. It was the 16th before I got a big picking.

Q. What is 1958, sir, on your Early LeGrands? That is the one you had mixed up.

A. That is one they put them all down, but 1958 we was way early, as I told you, the fruit was to be farmed and wasn't natural in '58.

The Court: Well, give us the date, and we will talk about it later.

The Witness: O.K. I started June 26th on the Early LeGrands.

Q. (By Mr. Shepard): Now, the point I am making by these dates, Mr. [242] Hagler, there is a definite distinction in your mind between the ripening period of the Early LeGrands and the LeGrands? A. Yes; a little.

Q. And when you used the comparison in your patent with the LeGrand, as being five to six days ahead of your Red King, and you named the LeGrand by patent number 549, there was no confusion in your mind as to whether you thought—

A. No; it was Regular LeGrand, since I have refreshed my memory and looked at these records, it was the Regular.

Q. Yes; did you, Mr. Hagler, have occasion to take any samples of your Red King this year?

A. Well, not personally. I have had Mr. Braun handle that for me. I have been kind of laid up ever since my wife passed away.

Q. I appreciate that.

(Testimony of Lyle Adrian Hagler.)

A. I have been leaving everything up to my help.

Q. I appreciate that, sir. Now, I am just asking you, for the record, you didn't get any Sun Grand samples then yourself personally?

A. No; I didn't. I didn't even take Red Kings personally, myself, but I was with Mr. Braun several times when he took them. He took them pretty often, all summer, or spring, rather.

Q. Did you go to any of the Sun Grand ranches with [243] Mr. Braun?

A. Yes; I went to one.

Q. Which ranch was that?

A. The Tagus Ranch.

Q. And did you keep the fruit, or did Mr. Braun?

A. Mr. Braun kept all of it. I believe later, when I was away from home, he left some out in my storage; I still have that. I am pretty sure I've got Sun Grand and Red King both.

Q. Now, did you draw up this patent, or did Mr. Braun draw it up and then you signed it?

A. Mr. Braun got all the data together, and Mr. Houk is the one that drawed it up for me, and we sent it in to the Patent Office.

Q. How many of the Red Kings, approximately, does your brother have? Trees?

A. Well, I think he has around 400, three or four hundred. I wouldn't be certain because I just gave him the buds to graft later.

Q. You shipped all of your Red Kings for the

(Testimony of Lyle Adrian Hagler.)

years in question, '57 and '58, through Mr. Girazian?

A. Yes, sir.

Q. At his Kingsburg Packing House?

A. That is right.

Q. You, of course, do not claim that you have any [244] permission to grow Sun Grands?

A. No; I haven't.

Q. One other question I may have overlooked: Did you notice the leaves or the glands of your Red King, and can you describe them, as to what they are?

A. No; I couldn't describe them, because I am not up on that kind of business. I just relied on Mr. Braun, he showed me one day they must run two glands to the leaf.

Q. Did he show you what kind of glands they were?

A. Yes; he said they were globular, I think.

Q. Globose? A. Globose, yes.

Q. Other than that, you didn't pay too much attention? A. No; I didn't.

Q. One other thing, Mr. Hunter is a partner of yours in the mining business?

A. That's right.

Q. And as to his fruit ranch you kind of take care of the picking and harvesting of his fruit, while he takes care of your mining interests?

A. Yes; he was gone away most of the summer up to this last year, and I see about the harvesting. They do all the rest of the work, just the harvesting and packing is all I do.

(Testimony of Lyle Adrian Hagler.)

Q. Now, you said that you started with your nectarines [245] in 1945, or thereabouts?

A. Thereabouts. I bought the first nectarines from Mr. Kim, I believe. I would have to look back at the record.

Q. I am not holding you to the particular year. You mention, though, that you did start out with Mr. Kim's nectarines, was it the LeGrand?

A. Well, the first year I got some LeGrands, and I got Quettas and John River, and from some of the LeGrand the first year I started in nectarines.

Q. And you have grown, as your records show, LeGrands pretty heavily over the years?

A. Well, I planted LeGrands for three or four years, I haven't planted any since. I have around probably 50 acres of the Regulars.

Q. Now, on two occasions in the past you have asexually reproduced additional LeGrand nectarines patented by Mr. Anderson and owned by Mr. Kim, without his consent?

Mr. Houk: Just a minute, if the Court please. We are going to object to this. We don't think it has any bearing on the case. It has to do with an entirely different fruit and different years. We have been sitting back and letting this go on at length but we don't think it is material to the question involved here and we don't think it is proper evidence in this case.

Mr. Shepard: Your Honor please, I submit it on the [246] ground—

Testimony of Lyle Adrian Hagler.)

The Court: I will allow it to go in. I don't think it amounts to much anyway; it doesn't go to wilfulness, the fact the man may have infringed another patent doesn't mean he infringes this one. However, if you want it in, put it in. You may answer.

Q. (By Mr. Shepard): Is that correct, Mr. Hagler? A. What was the question again?

The Court: Read the question, Miss Schulke.

(Question read.)

A. Well, it's kind of a mixup on that deal. When I originally bought the first nectarines from Mr. Kim, I told him I didn't know whether I would like these John River nectarines or not, and he told me that if I didn't I could bud them over the next year, as soon as I found out whether I cared for them or not, as long as I didn't bud any outside my own ranch it was all right to go ahead with it.

Q. (By Mr. Shepard): However, in 1949, you actually paid Mr. Kim, under written agreement, compromise payment for infringement on his LeGrand without a license, is that correct?

A. '49, I don't remember the date, but I paid him. The next year he forgot all about it, what he told me, and rather than to go into court I settled out of court. It didn't [247] cost me, I figured, any more, that is the reason I settled with him.

The Court: All right.

Q. (By Mr. Shepard): And again in 1952, you

(Testimony of Lylé Adrian Hagler.)

paid a substantial sum for asexually reproducing the LeGrand without a license for some 840 trees?

A. That was under the same deal, just worked over other trees I got from Mr. Kim.

Q. But these were three years apart?

A. Yes; I tried them out a little longer.

Q. Well, I mean in 1949 you made a compromise and paid him something? A. Yes.

Q. In 1952 you did the same thing?

A. Yes, sir.

Q. As to another group of trees?

A. That is right.

Mr. Shepard: That is all the questions I have. I have the agreements, if counsel want to see them.

The Court: I am not interested in the compromise agreement. Were you going to offer the agreement?

Mr. Shepard: I would like to offer them.

The Court: All right, offer them.

Mr. Shepard: This is the 1952 agreement, and I show you [248] your signature here, and ask you if you recognize your signature, and Mr. Kim's?

A. Yes; that is mine.

The Court: All right. It may be received. This is the first compromise agreement. Mark it 9.

(The agreement referred to was marked as Plaintiff's Exhibit 9, and was received in evidence.)

Mr. Shepard: This is in 1949—

The Court: Go ahead, I can listen while I—